Supreme Court, U.S.
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No. ____

In the
Supreme Court of the United States

ROBERTA BUGENIG,

Petitioner,

v.

HOOPA VALLEY TRIBE; THE HOOPA VALLEY TRIBAL COUNCIL; THE TRIBAL COURT OF THE HOOPA VALLEY TRIBAL RESERVATION; BYRON NELSON, JR., Honorable Judge of the Hoopa Valley Tribal Court; MERV GEORGE, Chairman of the Hoopa Valley Tribal Council,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ninth Circuit held that Congress granted to the Hoopa Valley Indian Tribe regulatory jurisdiction over fee simple property belonging to nonmembers (including non-Indians) when it enacted the Hoopa-Yurok Settlement Act of 1988, 25 U.S.C. §§ 1300i-7.

1. When delegating regulatory jurisdiction over nonmember owned fee simple property to an Indian tribe, must Congress describe that delegation in express and unambiguous language that refers to nonmember owned fee simple property?

2. Does Congress have the authority to delegate regulatory jurisdiction over fee simple property belonging to a nonmember to the Hoopa Valley Indian Tribe?

LIST OF ALL PARTIES

Petitioner: Roberta Bugenig.

Respondents: Hoopa Valley Tribe; the Hoopa Valley Tribal Council; the Tribal Court of the Hoopa Valley Tribal Reservation; Byron Nelson, Jr., Honorable Judge of the Hoopa Valley Tribal Court; Merv George, Chairman of the Hoopa Valley Tribal Council.

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PETITION FOR WRIT OF CERTIORARI

Roberta Bugenig respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals, en banc, in *Bugenig v. Hoopa Valley Tribe*, is reported at 266 F.3d 1201 (9th Cir. 2001), and is reproduced as Appendix A. The Ninth Circuit's order vacating an earlier decision and granting rehearing en banc is reported at 240 F.3d 1215 (9th Cir. 2001), and reproduced as Appendix B. The original, now vacated, decision of the Ninth Circuit Court of Appeals is reported at 229 F.3d 1210 (9th Cir. 2000), and reproduced as Appendix C. The final judgment of the United States District Court, Northern District of California, March 8, 1999, is unreported and is reproduced as Appendix E. That court's amended Order of March 31, 1999, is unreported and reproduced as Appendix D.

A prior case in this matter was litigated in Tribal Court. For this Court's convenience, the Opinion of the Northwest Regional Tribal Supreme Court in and for Hoopa Valley, decided on April 28, 1998, and reported at 25 Indian L. Rep. 6139 (1998), is attached as Appendix F. The Order of the Hoopa Valley Tribal Court, July 11, 1996, is attached as Appendix G.

JURISDICTION

The final opinion of the United States Court of Appeals for the Ninth Circuit was issued on September 11, 2001. This petition is timely filed under Supreme Court Rule 13. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Indian Commerce Clause, United States Constitution, Article I, section 8, gives Congress power "[t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The Hoopa-Yurok Settlement Act of 1988, 25 U.S.C. § 1300i-7, states:

> The existing govening [sic] documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed.

Relevant excerpts of the Hoopa-Yurok Settlement Act of 1988, 25 U.S.C. § 1300i, *et seq.*, are reproduced at Appendix H.

The Hoopa Tribal Constitution, the Preamble, Articles I, II, III, and relevant portions of Article IX, are reproduced at Appendix I.

STATEMENT OF THE CASE

In 1995, Roberta Bugenig purchased 40 acres of fee-simple land on which she wished to retire. The land was located within the boundaries of the Hoopa Valley Indian Reservation, near where her family had lived for nearly 150 years. The land is accessible by and adjacent to a public highway that Indians and non-Indians traverse freely.

Mrs. Bugenig is not a member of the Hoopa Valley Indian Tribe and cannot participate in its government.

So that she could raise enough money to build her retirement home (and to make room for that home), Mrs. Bugenig was obliged to cut down some of the second-growth trees on her land. Her plans were designed to be consistent with state and county land use policies and practices. She developed her plans in cooperation with the California Department of Forestry and the Humboldt County Planning and Building Department. Throughout the planning process, she intended only to achieve her modest goal of building a home in which to live.

In July of 1995 Mrs. Bugenig received the necessary certification from the Humboldt County Planning Division and a "Less Than 3 Acre Conversion Exemption" from the California Department of Forestry (CDF). On July 26, 1995, Mrs. Bugenig, relying on the exemption, began cutting trees on her land.[1]

Unbeknownst to Mrs. Bugenig, however, the Hoopa Valley Indian Tribe had adopted a timber management plan on January 28, 1995 (and ratified that plan on February 2, 1995), that claimed a permanent buffer zone that prohibited all timber harvesting activities within one-half mile on either side of the site of a deer skin dance trail, a trail that begins south of Mrs. Bugenig's property near the banks of the Trinity River, proceeds northward along a public highway, and then proceeds to a gathering spot to the west of the highway which itself is to the west of Mrs. Bugenig's parcel. The dance takes place every

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[1] *See* Excerpt of Record (ER) at 36, filed with Mrs. Bugenig's opening brief to the Ninth Circuit Court of Appeals. For the Court's convenience, citations to the trial court record will be placed in footnotes.

other year in this area.[2] All of Mrs. Bugenig's property is located within the buffer zone. Appendix at A-10. Two days after Mrs. Bugenig began harvesting her trees, the Hoopa Valley Tribal Council (Council) issued to Mrs. Bugenig a CEASE AND DESIST NOTICE asserting that ONLY the Hoopa Valley Tribal Council has the authority to make land use changes.[3] Furthermore, the Council threatened to take criminal and civil actions against Mrs. Bugenig.[4] On August 10, 1995, the Hoopa Valley Tribal Court issued an Order of Preliminary Injunction restraining her from cutting down any trees on her property.[5] In turn, the Tribe brought other legal proceedings against Mrs. Bugenig and Mrs. Bugenig objected, claiming that the Tribe lacked jurisdiction over her property.[6]

On October 10, 1995, the California Department of Forestry and Fire Protection sent a letter to Mrs. Bugenig revoking her conversion exemption.[7] In a letter sent the following week, the department advised her that it was

> withhold[ing] judgment on whether or not the tribe has the authority to impose their zoning ordinances

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[2] United States District Court Docket Entry (DE) at Tab 3, Exh. 6, Declaration of Byron Nelson; *see also* Walter R. Goldschmidt & Harold E. Driver, *The Hupa White Deerskin Dance*, 35 U. of Cal. Publications in American Archeology & Ethnology 1934-1943 103, 106 (A.L. Krober ed. 1943).

[3] ER at 6-7; *see also* Appendix at A-10.

[4] ER at 6-7.

[5] ER at 14-15; *see also* Appendix at A-10 to A-11.

[6] *See, e.g.*, DE at 21, Tab 1, Tab 16, and DE at 21, Tab 44.

[7] DE at 21, Tab 48 at 33-34 (Appendix).

> on non-tribal lands or whether the Department will enforce such ordinances.[8]

On July 11, 1996, the tribal trial court issued its final decision and order, granting judgment in favor of the Hoopa Valley Tribe, ruling in particular that

> Humbolt [sic] County does not have authority or subject matter jurisdiction within the exterior boundaries of the Hoopa Valley Reservation to regulate land use. This jurisdictional authority lies exclusively with the Hoopa Valley Tribal Council and membership of the Hoopa Valley Tribe.

Appendix at G-6.

On July 19, 1996, Mrs. Bugenig timely filed her notice of appeal from the decision and order of the Hoopa Valley Tribal Court, based in part on the assertion that the Tribal Court was without jurisdiction to hear the matter.[9] Subsequently, the Tribe placed a lien, which is still in place, on Mrs. Bugenig's property in a dispute over the removal of the trees that had been previously cut.[10]

The decision of the tribal trial court was affirmed by the Northwest Regional Tribal Supreme Court in and for Hoopa Valley on April 28, 1998. *See* Appendix F. The court ruled that the Tribe had jurisdiction under the second exception of *Montana v. United States*, 450 U.S. 544 (1981), to the general

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[8] DE at 21, Tab 48 at 35 (Appendix). State law, incidentally, specifically protects Native American religious resources. Cal. Pub. Res. Code § 5097.9. By utilizing state resources, the Tribe can (and did) get the state to put a hold on timber harvesting pending further analysis.

[9] DE at 21, Tab 44.

[10] ER at 28-29; *see also* Appendix at A-11.

rule that tribes do not have jurisdiction over private non-Indian owned fee property. Specifically, it held that Mrs. Bugenig's timber harvesting activities would threaten the health and welfare of the Tribe by affecting the sanctity of the location of the dance. Appendix at F-23. The court did not address the assertion of tribal jurisdiction alleged to be contained in the language of the Hoopa-Yurok Settlement Act of 1988 (Settlement Act) (the sole basis of the decision by the Ninth Circuit below). The court determined, furthermore, that there was no consensual relationship between Mrs. Bugenig and the Tribe that would invoke the first exception of *Montana*. Appendix at F-23.

Mrs. Bugenig filed her complaint in federal district court in the present case on September 4, 1998.[11] The tribal defendants filed a motion to dismiss on November 30, 1998. The district court entered an order dismissing the case on March 4, 1999. Judgment was entered March 8, 1999. Appendix E. An amended order was filed March 31, 1999. Appendix D. The district court below based its decision on its interpretation of the Settlement Act, an issue not reached by the tribal appellate court, finding that the language of the statute served to give the Tribe jurisdiction over Mrs. Bugenig's property. *Id.* at D-8 to D-9. The court's decision did not touch upon the Tribe's suggestion that the two exceptions in *Montana* applied.

A three-judge panel of the Ninth Circuit Court of Appeals reversed on October 3, 2001. Appendix at C-26. The panel began by noting: "The fact that nothing in the Settlement Act itself explicitly confers upon the Tribe jurisdiction to regulate nonmembers raises serious questions as to how carefully Congress considered whether it was making any grant of regulatory authority to the Tribe." Appendix at C-11. Turning to the legislative history of the Act, the court found no clear

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[11] ER at 39-45.

indication that Congress had intended to grant to the Tribe jurisdiction over fee simple property such as Mrs. Bugenig's: "The legislative history contains no indication that Congress considered giving or intended to give the Tribe authority to exercise jurisdiction over fee-patented land owned by non-Indians such as Bugenig." Appendix at C-11. Examining the words of the Act itself, the court noted that nowhere in the statute were the usual words or indications that this Court has always found to be persuasive in determining that there has been an express delegation. Appendix at C-14 to C-18. Finding no express delegation the court found no reason to examine the constitutional question of whether Congress *could* have granted the Tribe jurisdiction in this case. Appendix at C-18 n.5. Finally, the court concluded that none of the *Montana* exceptions provided authority for tribal jurisdiction over Mrs. Bugenig's property.

The Ninth Circuit granted the Tribe's petition for rehearing en banc. Appendix B.

A divided en banc panel of the Ninth Circuit affirmed the district court decision. In words described by three dissenters as "a marvelous act of interpretation, bordering on thaumaturgy," Appendix at A-43 (Fernandez, J., dissenting), the court held that the Settlement Act delegated to the Tribe regulatory authority over Mrs. Bugenig's property. It relied on language in that Act that Congress "ratified and confirmed" the Tribal Constitution and thereby adopted language in that Tribal Constitution, and the local laws enacted pursuant to that constitution, all of which together allegedly served to extend tribal jurisdiction to all land within reservation boundaries, including fee simple property owned by non-Indians. Appendix A, *passim*. The court further held that Congress had the constitutional authority to make such a delegation. Appendix at A-13 to A-16, A-27 to A-37. The court did not reach the question of whether tribal jurisdiction over Mrs. Bugenig's

property could be supported by any of the exceptions of *Montana.*

Three judges dissented, describing the purported language of delegation as being too ambiguous and too lost in "the midst of a fuliginous cloud of words" for there to be an effective and express delegation. Appendix at A-38 (Fernandez, J., dissenting). Employing a gladitorial metaphor of a warrior with a net and trident, the dissenting opinion further suggested that the court should not "decide that by using the constitution's unexceptional language the Tribe, like a retiarius, ensnared and skewered Congress, thereby obtaining exceptional jurisdiction." Appendix at A-42 (Fernandez, J., dissenting). The dissenters further described the tribal "constitution's bland language as a power grab over land and peoples not related to the Tribe itself or to its government." *Id.* at A-42 (Fernandez, J., dissenting).

REASONS FOR GRANTING THE WRIT

It is undisputed that the fee land that is now owned by Mrs. Bugenig first became private property as a result of the Indian General Allotment Act, 24 Stat. 390 (1887) (current version at 25 U.S.C. § 331, *et seq.* (2001)). The General Allotment Act, after the passage of a trust period, provided that patent should issue and then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside. 25 U.S.C. § 349. The end result of the Allotment Act was to diminish tribal jurisdiction over certain non-Indian owned fee lands. As this Court has made clear, because the intent of the Allotment Act was to do away with the reservation system, it was only natural that the non-Indian owners of the allotments were to be under state, rather than tribal, jurisdiction.

> It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

Montana, 450 U.S. at 559 n.9; quoted most recently in *Atkinson Trading Company v. Shirley*, 532 U.S. 645, 121 S. Ct. 1825, 1830 n.1 (2001). This Court in *Montana* noted exceptions to the general rule that tribes lack jurisdiction over fee property purchased by non-Indians:

> But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without *express congressional delegation.*

450 U.S. at 564 (emphasis added). The opinion further elaborated the exceptions to the general rule against tribal jurisdiction:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements .... A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 565-66 (citations omitted).

While the tribal supreme court found tribal jurisdiction through the political integrity exception, the Ninth Circuit relied instead upon the finding of an "express congressional delegation." However, it did so by relying on ambiguous

statutory language that purported to incorporate an ambiguous Tribal Constitution. This manner of "express" delegation is in conflict with every other delegation countenanced by Congress or this Court. The Ninth Circuit also purported to find a delegation of authority that Congress never had in the first place, a delegation in conflict with numerous decisions of this and other courts relating to the extent of federal jurisdiction over allotted lands on Indian reservations.

This leads to the questions presented to this Court: Did Congress expressly grant to the Tribe jurisdiction over fee simple property using language far more ambiguous than the delegation standards of this Court and a lower court that examined the issue? And, did Congress actually have authority under the United States Constitution to grant to the Tribe land use regulation that had previously been exercised exclusively by the State of California?

I

THE COURT BELOW FOUND AN "EXPRESS" DELEGATION USING STANDARDS EMPLOYED BY NO OTHER COURT

The Ninth Circuit's finding of a delegation to the Hoopa Valley Indian Tribe of regulatory authority over fee simple land owned by non-Indians is unprecedented both in terms of the scope of the delegation, granting unlimited regulatory authority over fee lands, but also in the manner in which the delegation is purported to have been effected. As will be shown, there is not a single word in the Settlement Act itself that discusses such a delegation of jurisdiction. Instead, the delegation is purported to exist in the Tribal Constitution that the Settlement Act "ratified and confirmed." 25 U.S.C. § 1300i-7. As will be further shown, the Tribal Constitution is also quite ambiguous, and there is no clear indication of the unprecedented usurpation of jurisdiction that the Ninth Circuit reads into that document. In every other case of delegation, both Congress and this Court

have been very careful to make sure that the language of delegation is clear and unambiguous. In fact, in every other case of delegation, Congress has employed explicitly clear language that expressly refers to patented fee lands. The utter lack of any such reference in the Settlement Act puts the Ninth Circuit's opinion in stark contrast to and in conflict with numerous holdings of this Court.

A. The History Behind the Settlement Act Provides No Support for the Notion That Congress Meant to Grant the Tribe Jurisdiction over Fee Simple Property Owned by Non-Indians

The Settlement Act does not discuss in terms ambiguous or otherwise any express delegation of jurisdiction to the Tribe. Absent any statutory ambiguity, resort to legislative history should be unnecessary. However, to the extent that a majority of the en banc court below was able to find an express delegation of authority contained within the Settlement Act, there is at least an argument that the language is ambiguous. Therefore, in order to understand whether the language of the Settlement Act contains the language of delegation that courts traditionally have relied upon, it is helpful first to understand the historical context of the Settlement Act. Prior to the Settlement Act, no one tribe had exclusive jurisdiction over the reservation. This fact led to a long and bitter dispute between members of the Hoopa Valley Tribe and members of other tribes that lived on the reservation. The problem was that members of the Hoopa Valley Indian Tribe collected all the timber revenues from reservation lands, to the exclusion of members of other tribes who had been lawfully settled upon the reservation. *See, e.g.*, *Short v. United States*, 486 F.2d 561, 564 (Ct. Cl. 1973), *cert. denied*, 416 U.S. 961 (1974) (*Short I*); *Short v. United States*, 661 F.2d 150 (Ct. Cl. 1981) (*Short II*), *aff'd*, 719 F.2d 1133 (Fed. Cir. 1983) (*Short III*), *cert. denied*,

467 U.S. 1256 (1984). This dispute was not resolved until the passage of the Settlement Act.[12]

The history of the reservation, as summarized in the *Short* opinions, as well as in *Mattz v. Arnett*, 412 U.S. 481 (1973), shows that the core of the reservation (the Square) was first created in 1864 by the California Superintendent of Indian Affairs pursuant to powers ratified in the Indian Affairs Act of April 8, 1864, ch. 48, 13 Stat. 39. Since the reservation was formed, the Hoopa Valley Indian tribe was only one of many Indian tribes that occupied the reservation. *Short I*, 486 F.2d at 565. The *Short I* court expressly found the Hoopa Indians did not have exclusive or vested rights in the resources of the reservation. *Id.* Nor were the Hoopa Indians the sole aboriginal occupants of the Square. *Id.* at 564.

Unlike the traditional view of Indian reservations, where resources are considered held in trust for the tribal entity, the *Short* courts found that the resources were not held by the Hoopa Valley Indian tribe, or any other tribe. Instead, these resources were owned by the individual members of all the tribes inhabiting the reservation. *Short II*, 661 F.2d at 154 (rejecting theory that the Reservation and its resources are tribal property rather than the common property of the individual Indians); at 155-56 (noting that it was appropriate that individual Indians (rather than the tribes) receive payments and that there was no functioning tribal entity for the Yuroks). In fact, the Hoopa Valley Tribe was recognized only in 1950, *Short III*, 719 F.2d at 1136, many years after new allotments on the reservation had ceased being issued in 1933, *Short I*, 486 F.2d at 568. As the Hoopa Valley Tribe did not have jurisdiction over the resources on the reservation it would be

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[12] Even with the Act, some disputes remain. *See, e.g., Karuk Tribe of California v. Ammon*, 209 F.3d 1366 (Fed. Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001).

illogical to presume that it had jurisdiction over fee-simple property.

It was with this often bitter history in mind that Congress passed the Settlement Act in order to give the Hoopa Valley Indian Tribe jurisdiction over the "Square," the Yuroks jurisdiction over an "addition" to the reservation, and to help resolve the status and rights of the many other Indians, who were not members of either the Hoopa or Yurok tribes, but who had been settled on the reservation. Congress wanted to ensure that the Hoopas could govern the Hoopa reservation without the acrimony and uncertainty caused by the claims brought by the Yuroks and members of other tribes.[13] *See* 134 Cong. Rec. S13967 (Sept. 30, 1988) (statement of Sen. Inouye), at S13972:

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[13] *See* 134 Cong. Rec. H9406 (Oct. 3, 1988) (statement of Rep. Bosco), at H9410:

> As the Hoopa Tribe began to take advantage of a booming timber market, however, a dispute arose over the distribution of revenues from timber sales. This dispute turned the people against each other. It brought them to the courtrooms of Eureka, San Francisco, and the U.S. Supreme Court in a legal battle that has lasted some 25 years.
>
> Sadly, these people are some of the poorest in our country, suffering unemployment rates of over 60 percent. The money and energy expended on this protracted legal battle could better have been spent to strengthen these tribes and build the schools, health facilities, roads and other improvements needed by these people.
>
> The legislation recognizes that some Yurok Indians prefer to live in an organized community and others would simply want to receive funds held in trust for the tribes. This legislation will make funds available to the organized tribes and to individuals who heretofore would not be entitled to a distribution of such funds.

> As a result of some 25 years of litigation, the Hoopa Valley Tribe has lost its capacity to govern . . . the reservation square, and provide those programs it has so long delivered.

There is absolutely nothing, however, in the legislative history demonstrating any congressional desire to give either tribe jurisdiction over fee simple property belonging to non-Indians. With this history in mind, attention must be turned next to the language of the purported delegation.

B. The Purported Express Congressional Delegation Is Ambiguous and Overly Reliant upon a Strained Interpretation of the Tribal Constitution

The purported delegation reads in its entirety:

> The existing govening [sic] documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed.

25 U.S.C. § 1300i-7. This, of course, says nothing on its face about there being any delegation of authority from the United States to the Tribe of land-use regulatory authority over fee simple property. Nevertheless, the Ninth Circuit began its odyssey of delegation by focusing on the words "ratified and confirmed," finding that these words served to incorporate the Tribe's constitution as federal law, and then finding that the language of the Tribal Constitution unambiguously exerted jurisdiction over fee simple land belonging to non-Indians. This delegation is unlike any delegation of congressional authority previously encountered, and falls far short of the standards traditionally followed for determining whether there has been a delegation.

The three dissenters on the en banc panel quoted verbatim the original panel's vacated finding that this "ratify and confirm" language is not an express delegation:

> The fact that nothing in the Settlement Act itself explicitly confers upon the Tribe jurisdiction to regulate nonmembers raises serious questions as to how carefully Congress considered whether it was making any grant of regulatory authority to the Tribe. Moreover, the Settlement Act uses the same "ratified and confirmed" language to recognize the newly created Yurok Tribe, 25 U.S.C. § 1300i-8, which suggests that this language may simply represent Congress's attempt to establish the Hoopa Valley Tribe and the Yurok Tribe as the governing authorities for their respective reservations, rather than a consciously made delegation of authority to the tribes to exercise jurisdiction over nonmembers
>
> . . . .
>
> Despite this ambiguity with respect to the Settlement Act as a grant of power over tribal nonmembers, the district court interpreted § 1300i-7 as a congressional delegation of authority to the Tribe to exercise such jurisdiction. The district court reasoned that § 1300i-7's "ratified and confirmed" language works to "give[] every clause in the document being ratified the full force and effect of a congressional statute."

Appendix at A-39 to A-40 (Fernandez, J., dissenting), Appendix at C-11 to C-12.

There being no express delegation within the four corners of the Settlement Act, the district court and the en banc panel below focused instead on two articles, Article III and Article IX, of the "ratified and confirmed" Tribal Constitution as containing the grant of delegation. These will be taken in turn.

Article III states:

> The jurisdiction of the Hoopa Valley Tribe shall extend to all lands within the confines of the Hoopa Valley Indian Reservation boundaries as established by Executive Order of June 23, 1876, and to such other lands as may hereafter be acquired by or for the Hoopa Valley Indians.

Appendix at I-1 to I-2. The court below saw the perfunctory "all lands" reference as being the sine qua non of the delegation. However, this really is not clear at all. Referring to this section the dissenters noted that

> the district court was surely wrong when it determined that the language in question clearly conferred jurisdiction over non-Indians on non-Indian land within the boundaries of the reservation. There is not a whisper of that in the language in question; nor is there any reason to think that Congress divined that intention lurking in the words. To assume that jurisdiction means a general plenary jurisdiction over others and that all we need to do is ruminate on its territorial scope is to beg the question.
>
> . . . .
>
> As it is, there is nothing remarkable about a tribal constitution's declaration that the reach of tribal authority will extend to its own boundaries, and that is all the language at hand declares. That is a far cry from saying that the tribe will have unrestricted authority to regulate the use of non-Indian land within those boundaries, regardless of the fact that a tribe generally has no such powers.

Appendix at A-41 (Fernandez, J., dissenting). Another reason why the "all lands" language is inadequate as an express grant

of jurisdiction is because the final clause of Article III refers "to other lands as may hereafter be acquired by or for the Hoopa Valley Indians." These "other lands" logically include fee simple property that belongs to non-Indians such as Mrs. Bugenig. If that is a logical reading of this part of Article III, then this is anything *but* an express congressional delegation.

Second, the panel below found that Article IX, section 1(1), of the Tribal Constitution dispositive. That section reads in relevant part:

> Section 1. The Tribal Council shall have the following powers subject to any limitations imposed by federal statutes or by the Constitution of the United States.
>
> . . . .
>
> (l) To safeguard and promote the peace, safety, morals and general welfare of the Hoopa Valley Indians by regulating the conduct of trade and the use and disposition of property upon the reservation, provided that any ordinance directly affecting non-members of the Hoopa Valley Tribe shall be subject to the approval of the Commissioner of Indian Affairs or his authorized representative.

Appendix at I-2. The en banc panel found that this section of its constitution is "unambiguous" and that it "unequivocally" delegates jurisdiction over nonmembers if that jurisdiction is claimed in any tribal ordinance. Appendix at A-23. But as the dissenters and vacated panel decision point out, "that language appears to do no more than allow for regulation of 'consensual commercial dealings between tribal members and nonmembers.'" Appendix at A-41 n.2 (quoting Appendix at C-13).

The court below overreached when it translated the words of Article IX, "directly affecting nonmembers," into a blanket congressional grant of regulatory jurisdiction over nonmember activities on non-Indian fee land. This provision could best and most easily be interpreted to refer to *in personam* jurisdiction over non-Indians within the reservation, an interpretation that would be consistent with the presumption against tribal regulatory jurisdiction over non-Indian fee lands. *See County of Yakima v. Confederated Tribes and Bands of Yakima Indians*, 502 U.S. 251, 264-65 (1992). Because this section refers to the nonmembers and not their fee land, the Tribe's interpretation is too much of a reach. In short, there is no showing that Congress understood that it was agreeing to anything except allowing for Hoopa tribal regulation of activities (by members and nonmembers) involving Hoopa *reservation* lands.[14]

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[14] The court's expansive reading of the words "ratifies and confirms" has some potentially significant ramifications for other congressional acts dealing with Indian Tribes that have employed similar language. *See, e.g.*, 25 U.S.C. § 1725(b)(1) (ratifying and confirming the Maine Implementing Act, affecting state jurisdiction over the Passamaquoddy Tribe and the Penobscot Nation); 25 U.S.C. § 941m(e)-(f) (settlement agreement between South Carolina and Catawaba Tribe "ratified and confirmed," including ability of State and Tribe to amend the settlement agreement). *See also* various ratifications and confirmations of other tribal settlement agreements at 25 U.S.C. § 640d (Navajo and Hopi); § 672 (Ute); § 1750b (Miccosukee); § 1771 (Wampanoag); § 1773 (Puyallup); § 1776b (Crow); and § 1778b (Torres-Martinez Desert Cahuilla). Similarly, statehood acts employ such language in ratifying and confirming state constitutions. *See, e.g.*, Idaho Admission Act, ch. 656, 26 Stat. 215 (1890); Alaska Statehood Bill, Pub. L. No. 85-508, 72 Stat. 339 (1958).

C. The Finding of an Express Delegation Is in Conflict with Decisions of This and Other Courts Requiring Truly Express and Unambiguous Language of Delegation

There can be no argument that before the Settlement Act the State of California had regulatory jurisdiction over fee simple property on the Hoopa Valley Indian Reservation. Similarly, there can be no argument that tribes are presumed *not* to have regulatory jurisdiction over non-Indian fee lands. *See Montana*, 450 U.S. at 565-66. As emphasized by this Court last term:

> Hitherto, the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land.

Nevada v. Hicks, 121 S. Ct. 2304, 2310 (2001).

And, absent a relevant exception of *Montana*, there must be a valid congressional delegation of authority in order for the Tribe to regulate non-Indian fee property. Furthermore, in order to find that Congress has delegated the power to regulate such fee lands to tribes, this Court has always required that such an intent be made in express terms. *See, e.g.*, *Montana*, 450 U.S. at 564.[15]

The usual and traditional way for Congress to express its intent to delegate to a tribe regulatory authority over non-Indian fee property has been to include specific language in the particular act in question. Thus, when Congress passes a statute

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[15] Similarly, with respect to attempts to convey navigable waters to a tribe, this Court warned one "must not infer such a conveyance 'unless the intention was definitely declared or otherwise made very plain' . . . or was rendered 'in clear and especial words.'" *Montana*, 450 U.S. at 552 (citations omitted).

giving tribes authority to carry out some governmental function on fee simple lands, Congress expressly states that the statute applies to all land in a reservation "*notwithstanding the issuance of any patent.*" *See, e.g.*, 18 U.S.C. § 1151 (defining Indian Country in context of tribal and federal criminal jurisdiction); 23 U.S.C. § 402(i) (jurisdiction of highway safety programs); 25 U.S.C. § 3902(3)(A) (defining Indian country for purposes of open dump cleanups on Indian lands); 30 U.S.C. § 1291(9) (jurisdiction over surface mining operations); 33 U.S.C. § 1377(h) (defining Indian reservations for possible treatment as state in Clean Water Act regulation); 42 U.S.C. § 7410(o) (defining scope of jurisdiction over tribal air quality plans pursuant to "tribal implementation plans" in Clean Air Act). Each one of these statutes contains the express "notwithstanding the issuance of any patent" language and each one therefore contains an unambiguous expression of congressional intent to delegate to the Tribe regulatory authority over fee simple non-Indian property.

Indeed, in the only cases where this Court has found that Congress delegated regulatory jurisdiction over fee lands to a tribe, the "notwithstanding the issuance of any patent" language was dispositive. Thus, this Court in *United States v. Mazurie*, 419 U.S. 544, 547 n.3 (1975), and in *Rice v. Rehner*, 463 U.S. 713, 729 (1983), found congressional delegations to the tribes (and states) of the federal authority to regulate the sale of liquor on Indian reservations contained in a combination of 18 U.S.C. § 1151 and § 1161, the former of which contains the "notwithstanding" proviso.

Similarly, in *Seymour v. Superintendent*, 368 U.S. 351, 353 (1962), this Court noted that the "notwithstanding the issuance of any patent" language removed any "uncertainty" over the extent of federal criminal jurisdiction in "Indian country."

Since Congress has always employed the "notwithstanding the issuance of any patent" language in its express delegations, and since this Court has found express delegations *only* when that language has been present, the decision of the Ninth Circuit is in conflict with the holdings of this Court.

There has been only one other significant case resolving whether there has been an express delegation of congressional authority to an Indian tribe. In *Arizona Public Service Company v. Environmental Protection Agency*, 211 F.3d 1280 (D.C. Cir. 2000), *cert. denied, sub nom. Michigan v. Environmental Protection Agency*, 121 S. Ct. 1600 (2001), the United States Court of Appeals for the D.C. Circuit found that Congress had authorized tribal jurisdiction over non-Indian fee property for purposes of 42 U.S.C. § 7601(d)(2), a provision of the Clean Air Act. Section 7601(d)(2) allows tribes, under certain circumstances, to enforce the Clean Air Act within the boundaries of an Indian reservation. The Court found that Congress provided an express delegation of federal authority over fee property despite the absence of the "notwithstanding the issuance of any patent" language in this subsection. 211 F.3d at 1288. Nevertheless, the court also noted that the particular "notwithstanding" language was found elsewhere in the act, at 42 U.S.C. § 7410(o), which deals with tribal enforcement of "tribal implementation plans" and which cross-references § 7601(d)." 211 F.3d at 1295.

Judge Ginsburg, however, wrote in dissent that although there was an express delegation of federal authority (utilizing the "notwithstanding" language) to the tribes over fee simple non-Indian land in section 7410(o), that such a delegation could not be imputed to the more expansive section 7601(d)(2). 211 F.3d at 1302-03. In language that was adopted by the original, now vacated, Ninth Circuit decision in *Bugenig*, Judge Ginsburg found that employment of the "notwithstanding the issuance of any patent" language was the "gold standard" for delegations. While congress may certainly express its intent to

delegate its authority in other ways, he wrote, it ought to at least be as clear and unambiguous, rather than an "obscure and never-before-attempted formulation to accomplish the same result." 211 F.3d at 1303.

Nonetheless, unlike the Settlement Act at issue in this case, at least Congress had employed the "notwithstanding" proviso somewhere in the Clean Air Act and cross-referenced that proviso to other provisions of the statute.

D. Assertions of Federal Authority That Impinge upon State Sovereignty Must Be Strictly Construed and Not Based upon Ambiguous Language

Another reason why this Court should grant Mrs. Bugenig's petition for writ of certiorari is that the decision below is inconsistent with this Court's repeated admonitions not to find congressional intent that impinges on state sovereignty unless Congress' intent is plain. Thus, in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), this Court wrote that when interfering with attributes of state sovereignty,

> "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" this balance. We explained recently: "If Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' . . . Congress should make its intention 'clear and manifest.'"

501 U.S. at 460 (citations omitted).

Pointedly, this Court called for "special care when interpreting alleged congressional intrusions into state sovereignty under the Commerce Clause." *Id.* at 463 n.*. The same principle should apply with equal force to the Indian

Commerce Clause. As shown above, the Settlement Act is, at best, ambiguous as to whether it demonstrates a congressional intent to delegate authority to the Tribe. As this Court also noted: "To give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." 501 U.S. at 464 (citing Laurence H. Tribe, *American Constitutional Law* § 6-25, at 480 (2d ed. 1988)).

More recently, in *Solid Waste Agency of Northern Cook County v. United States Corps of Engineers*, 531 U.S. 159 (2001), this Court determined that ambiguous language in the Clean Water Act did not give the Corps jurisdiction over isolated wetlands. This Court noted that the "[r]egulation of land use [is] a function traditionally performed by local governments," 531 U.S. at 174 (citation omitted), and refused to acquiesce to an administrative interpretation of a statute that impacted a local government function; especially when that very statute expressed an intent *not* to interfere with "the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." *Id.* (quoting 33 U.S.C. § 1251(b)).

The decision of the court below conflicts with this Court's wariness to find congressional intrusions upon state sovereignty and land use planning prerogatives.

II

THE NINTH CIRCUIT'S FINDING THAT CONGRESS HAS CONSTITUTIONAL AUTHORITY TO GIVE THE TRIBE REGULATORY JURISDICTION OVER FEE SIMPLE PROPERTY CONFLICTS WITH NUMEROUS DECISIONS HOLDING THAT THE FEDERAL GOVERNMENT LACKS PLENARY REGULATORY AUTHORITY OVER FEE LANDS BELONGING TO NON-INDIANS

Even if Congress had expressed an intent to grant the Tribe jurisdiction over fee simple property, the question remains whether Congress had the power to do so. The problem here is that once lands were allotted, they became subject to state regulatory jurisdiction in derogation of tribal and federal control. The Ninth Circuit suggests, however, that the federal government retains "plenary" authority over the reservations and therefore can delegate its plenary authority to the tribes. Appendix at A-28 to A-32.

The term "plenary" may be an accurate enough description of the federal government's power to regulate tribal relations and the reservation land that remains in trust for the Indian tribes. *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145-46 (1980). But there is no authority for the proposition that the federal government retains any sort of plenary regulatory authority over nonmember fee land. Instead, the court below infers, incredibly, such authority from *Montana* because that case recognized that the tribes might, in exceptional circumstances, have jurisdiction under the exceptions of that case. Appendix at A-30. This not only turns *Montana* on its head, but it is in conflict with virtually every case that has examined the extent of federal jurisdiction over allotted lands–including cases from the Ninth Circuit.

Numerous decisions of several courts have held that once a patent is issued for an allotment the trust relationship between

the federal government and the owner of the fee ends. For example, in an opinion affirmed by the Ninth Circuit, the District of Montana held:

> The issuance of the fee patent had a broader effect than merely to free plaintiff to sell her land—it freed the United States from its trustee duties and altered the relationship of the land and plaintiff to the State of Montana.

Dillon v. Antler Land Co. of Wyola, 341 F. Supp. 734, 741 (D. Mont. 1972), *aff'd*, 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 421 U.S. 992 (1975).

In *Levindale Lead & Zinc Mining Co. v. Coleman*, 241 U.S. 432, 438 (1916), this Court noted:

> We find no indication of an intent that they [federal restrictions on trust land] should apply to lands, or an interest in lands, which had come lawfully into the ownership of white men who were non-members of the tribe.

Cited with approval in Bailess v. Paukune, 344 U.S. 171, 173 (1952).

Similarly, this Court found: "As to them [patented allotments] the Government has no further interest in or control over the lands." *United States v. Waller*, 243 U.S. 452, 463 (1917). Continuing, the Court wrote:

> With those restrictions entirely removed and the fee simple patent issued it would seem that the situation was one in which all questions pertaining to the disposal of the lands *naturally would fall within the scope and operation of the laws of the State.*

243 U.S. at 463 (emphasis added).

The District of Columbia Circuit has noted that once allotted lands are patented the federal supervision ceases:

> [T]he supervision of the Secretary over the royalties collected under the lease automatically ceased with the removal of the restrictions which occurred on . . . the termination of the special estate.

United States ex rel. Warren v. Ickes, 73 F.2d 844, 847 (D.C. Cir. 1934). Continuing, the court held:

> On removal of the restrictions the owner of the land and the funds was at full liberty to use, dispose of, and contract with relation to them in his or her individual capacity, without reference to approval or disapproval of the Secretary of the Interior, subject only to approval of the court of competent jurisdiction, in this instance the *county court of Hughes county, Okl.*

Id. at 848 (emphasis added). *Cited with approval in United States ex rel. Noel v. Moore Mill & Lumber Co.*, 313 F.2d 71, 73 (9th Cir. 1963).

In sum, these cases demonstrate that once a fee patent issued on these allotted lands, the federal government had divested itself of direct (or plenary) regulatory oversight over these properties.

Nor is the Indian Commerce Clause a carte blanche for federal or tribal jurisdiction. For example, in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 153-54 (1982), the Court held:

> To date, however, this Court has relied on the Indian Commerce Clause as a shield to protect Indian tribes from state and local interference, and has not relied on the Clause to authorize tribal

> regulation of commerce without any constitutional restraints.

Congress no more has plenary land use regulatory authority over fee simple non-Indian owned land on Indian reservations deriving from the Indian Commerce Clause than it has plenary land use regulatory authority over fee simple non-Indian owned land outside the reservation pursuant to the (ordinary) Commerce Clause. The court below is in conflict with this great weight of authority.

The Ninth Circuit is also in error when it relies on liquor cases such as *Mazurie* in support of the notion that the federal government retains land use authority over fee simple property owned by non-Indians. *See* Appendix at A-30. That is because the very activity regulated, liquor sales to Indians, implicates actual *commerce* with Indians rather than an activity with limited impact on tribal members or tribal governments. Indeed, courts have long upheld restrictions on liquor sales from allotted fee property. In *Dick v. United States*, 208 U.S. 340, 354 (1908), this Court explained:

> [I]t was necessary that the Indians, remaining on the unallotted and retained lands, should be protected against the pernicious influences that would come from having the allotted lands used by citizens of the United States as a storehouse for intoxicants. Only the authority of the United States could have adequately controlled the conduct of such citizens. If intoxicants could be kept upon the lands of the allottees in severalty, it is easy to perceive what injury would be done to the Indians living on the other lands, who, in order to obtain intoxicating liquor, could go regularly or frequently to the places near by, on some allotted lands, where intoxicants were stored for sale or exchange.

In contrast to local land use regulation, the ability to regulate the sale of liquor within Indian Country is squarely within the ambit of the Indian Commerce Clause. Liquor sales within Indian Country were banned at least since 1832, and lesser bans were effected during the Colonial Era. *Rice v. Rehner*, 463 U.S. at 722. There is nothing in the terms of the Allotment Act that served to rescind the long-standing prohibition against liquor sales in Indian Country. The regulation of liquor sales was delegated to Indian Tribes in 1953. *See* 18 U.S.C. § 1161, *United States v. Mazurie*, 419 U.S. at 547.[16] In *Mazurie*, the Court upheld this delegation, finding first that Congress had the power to regulate liquor sales in Indian Country and second that it could delegate this power to Indian tribes.[17]

Mazurie, however, does not stand for the blanket proposition that Congress can take jurisdiction over regulatory activities that it never had and delegate that authority to a tribe. The regulation of activities on private fee property that do not involve commerce with Indians is not subject to Congress' authority under Article 1, section 8, unless either of the *Montana* exceptions exist. As noted, the court below did not rely on a *Montana* exception for its holding. Because Congress has no inherent power to assert land use regulation over

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[16] Because the 1953 act required conformance with state law, the regulation of liquor in Indian Country can best be described as concurrent jurisdiction. *Rice*, 463 U.S. at 722-23. The concept of concurrent jurisdiction is not at issue in this case as the Tribe asserts that only it has regulatory jurisdiction over Mrs. Bugenig's property. Appendix at G-6. Furthermore, there is no authority for finding that prohibitory land use regulation is amenable to concurrent jurisdiction.

[17] To be precise, this Court upheld the federal enforcement of federal law that incorporated a tribal liquor regulation.

Mrs. Bugenig's property, it cannot delegate that power to the Tribe.[18]

To the extent that the court below relies on cases involving federal jurisdiction over crimes committed by non-Indians on tribal and allotted lands, *see, e.g.*, *Seymour v. Superintendent*, Appendix at A-30, the court confuses *in personam* jurisdiction over non-Indians who happen to be within Indian Country with *in rem* jurisdiction over activities on fee simple property. This Court has made the distinction plain. In *County of Yakima v. Confederated Tribes and Bands of Yakima Indians*, 502 U.S. 251, this Court was confronted with the question of whether the County could impose certain real estate taxes on fee lands within the Yakima reservation. The Tribe argued, citing *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), that the Allotment Act had essentially been repealed and that any state assertion of jurisdiction over fee lands was unlawful. This Court disagreed. When looking at the entirety of the Allotment Act, this Court concluded that because "Yakima County's assertion of jurisdiction over reservation fee-patented land . . . is in rem rather than in personam, it is assuredly not *Moe*-condemned; and it is not impracticable either." *Id.* at 264-65. The Court therefore found that the county could impose certain taxes over all fee lands—owned by Indians and non-Indians alike. In other words, cases like *Seymour* that provide federal *in personam* jurisdiction over non-Indians acting within Indian country do not diminish the weight of authority against finding any federal authority over land use on fee simple property.

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[18] To the extent that Congress has delegated to tribes regulatory authority in the context of clean air and clean water legislation, such a delegation would be permissible if Congress asserted appropriate Commerce Clause authority over all activities that significantly affect clean air and clean water.

Thus, the federal government's power over activities on allotted lands is limited to those powers enumerated in the Constitution; this has never been held to include the police power of general land use regulation over private property. That leaves the State of California as the only entity with appropriate regulatory jurisdiction over timber harvesting activities on Mrs. Bugenig's property. The decision of the Ninth Circuit, therefore, is in conflict with the decisions of this and the lower federal courts.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: December, 2001.

Respectfully submitted,

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FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERTA BUGENIG,
Plaintiff-Appellant,

v.

HOOPA VALLEY TRIBE; THE HOOPA VALLEY TRIBAL COUNCIL; THE TRIBAL COURT OF THE HOOPA VALLEY TRIBAL RESERVATION; HONORABLE BYRON NELSON, JR., Judge of the Hoopa Valley Tribal Court; MERV GEORGE, Chairman of the Hoopa Valley Tribal Council,
Defendants-Appellees.

No. 99-15654

D.C. No.
CV-98-03409-CW

OPINION

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted
July 18, 2000—Seattle, Washington
Opinion Filed October 3, 2000

Rehearing En Banc Granted February 28, 2001

Argued and Submitted
June 19, 2001—San Francisco, California

Filed September 11, 2001

Before: Mary M. Schroeder, Chief Judge, and Procter Hug, Jr., Ferdinand F. Fernandez, Thomas G. Nelson, Andrew J. Kleinfeld, Barry G. Silverman, Susan P. Graber, M. Margaret McKeown, Kim McLane Wardlaw, Richard A. Paez, and Marsha S. Berzon, Circuit Judges.

Opinion by Judge Graber;
Dissent by Judge Fernandez

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OPINION

GRABER, Circuit Judge:

The issue for decision is whether the Hoopa Valley Indian Tribe (Tribe) has authority to regulate logging by a non-Indian on fee land that she owns, located wholly within the borders of the Tribe's Reservation, in order to protect tribal lands of cultural and historic significance. The district court held that Congress expressly delegated such authority to the Tribe. We agree, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We begin with a brief overview of the historical context in which the present question arises.

A. Establishment of the Reservation

In the middle of the Nineteenth Century, numerous conflicts erupted between White settlers and Native Americans in northern California. As California grew, due in part to the discovery of gold, clashes between the White settlers and the tribes increased in frequency and severity, usually to the detriment of the Native American populations. In response, Congress determined that "the best policy was to set aside small tracts of land in the new state for the tribes," in order to protect them from the worst effects of settlement. *See Partitioning Certain Reservation Lands Between the Hoopa Valley Tribe and the Yurok Indians, to Clarify the Use of Tribal Timber Proceeds, and for Other Purposes*, S. Rep. No. 100-564, at 4 (1988) (Senate Report). In accordance with that policy, Congress enacted legislation authorizing the President to establish four Indian reservations in California. Act of April 8, 1864, 13 Stat. 39, *et seq*.

Pursuant to the 1864 Act, President Lincoln appointed Austin Wiley as Superintendent of Indian Affairs for the State of California. Wiley then issued a proclamation, which was subject to the approval of the President, establishing the Hoopa Valley Reservation on the Trinity River in Klamath County, California. *Short v. United States*, 486 F.2d 561, 563 n.1 (Ct. Cl. 1973) (quoting text of proclamation); *see also, generally* Byron Nelson, Jr., Our Home Forever: A Hupa Tribal History (1978) (providing a detailed history of the Hupa Tribe). The Reservation extended six miles on either side of a twelve-mile stretch of the Trinity River, up to the junction of the Trinity and the Klamath Rivers. The "Square," the common name of the Reservation, did not garner presidential authorization until 1876, when President Grant issued an executive order approving Wiley's action. *Short*, 486 F.2d at 563 n.3. As defined by President Gram, the Square consisted of 89,572.43 acres on an area of land populated primarily by the Hoopa Valley Tribe. *Id.*; Senate Report at 5-6.

Fifteen years later, in 1891, President Harrison issued an executive order enlarging the Square by adding a tract of land one mile wide on each side of the Klamath River, extending to the Pacific Ocean. *See generally Mattz v. Arnett*, 412 U.S. 481, 485-94 (1973) (providing a detailed history of the Klamath River Reservation). The 1891 order created a single reservation by joining the Square with the Klamath River Reservation, which was populated mainly by the Yurok Indians but was not officially recognized as a reservation. The original Klamath River Reservation became known as the "Extension" or "Addition."

B. Congress Changes Course: Allotment and Reorganization

Contemporaneously with the events just described, Congress began to rethink its policy toward Native Americans. Instead of encouraging communalism and separatism through land grants to the tribes, Congress decided to encourage individual land ownership and, hopefully, eventual assimilation into the larger society. *Solem v. Bartlett*, 465 U.S. 463, 466-67 (1984). With that new goal in mind, in 1887 Congress passed the Indian General Allotment Act, 24 Stat. 388, codified at 25 U.S.C. § 331 (1887). That Act

> permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished. Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways.

Mattz, 412 U.S. at 496.

The allotment policy did not have its desired effect; that is, in many respects it did not benefit Native Americans. Philip P. Frickey, *A Common Law for our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 Yale L.J. 1, 14-15 (1999). One result of allotment was that large swaths of reservation land were lost from Indian control altogether, due to sales and tax foreclosures. Congress recognized this problem, so it reversed course and passed the Indian Reorganization Act (IRA) in 1934, 25 U.S.C. 461-479), in which it proclaimed that "no land of any Indian reservation . . . shall be allotted in severalty to any Indian." 25 U.S.C. § 461. The IRA was an "attempt to encourage economic development, self-determination, cultural plurality, and the revival of tribalism." Felix S. Cohen, Handbook of Federal Indian Law 147 (1982 ed.).

Section 16 of the IRA, 25 U.S.C. § 476, gave each Indian tribe "the right to organize for its common welfare, and . . . adopt an appropriate constitution and bylaws," which were to be approved by the Secretary of the Interior (Secretary). The Tribe did so and, in 1952, the Secretary approved its constitution and bylaws.

Although the IRA was Congress' attempt to reduce the negative effects of allotment, Congress did not try "to undo the dramatic effects of the allotment years on the ownership of former Indian lands. It neither imposed restraints on the ability of Indian allottees to alienate or encumber their fee-patented lands nor impaired the rights of those non-Indians who had acquired title." *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992). Thus, the policy of allotment shriveled some reservations; much property that once was under Indian control was sold off to non-Indians. Cohen at 137-38.

The Square emerged from this period mostly, although not completely, unscathed. That outcome was due, in part, to the

government's unwillingness to commit to wide-scale allotment on the Hoopa Valley Reservation. Nelson at 153-58, 195-96. The court below, the Northwest Regional Tribal Supreme Court for the Hoopa Valley Tribal Court of Appeals, found that less than one percent of the Square's approximately 90,000 acres is presently owned by non-Indians.[1] *Bugenig v. Hoopa Valley Tribe*, No. A-95-020, 25 Indian L. Rep. 6139, 6141 (Apr. 23, 1998). This one percent includes the land that now is owned by Plaintiff Roberta Bugenig and is at issue in this case.[2]

C. The Settlement Act

Members of at least four different Native American tribes lived within the boundaries of the Hoopa Valley Reservation. Senate Report at 6. However, neither the 1864 congressional act nor the 1876 or 1891 executive orders, by their terms, granted any governing rights to any particular tribe. *Short*, 486 F.2d at 568. Despite that omission, throughout the Twentieth Century, the Bureau of Indian Affairs (BIA) governed the Reservation as if the Square were a reservation for the Hoopas and as if the

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[1] Facts found by a tribal court are given deference unless they are "clearly erroneous." *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990). The record contains a map showing that 2.8 percent of the Reservation is held in fee by "Indian and non-Indian owners," but it does not distinguish between the two. Plaintiff presented no evidence to contradict the tribal court's finding. Accordingly, we defer to the tribal court's finding.

[2] The tribal court found that Plaintiff's property was allotted originally to members of the Hoopa Valley Tribe under the General Allotment Act. A twenty-acre portion, held in trust for Mae Wallace Baker, was converted to a fee simple patent in 1947, while another parcel, held in trust for Robert Pratt, was sold out of trust status in 1958 to Don H. Gould. Those parcels then became the property of a California Limited Partnership called the Gould Family Partnership, which sold them to Plaintiff in 1995. 25 Indian L. Rep. at 6141.

Extension were a reservation for the Yuroks. Senate Report at 7. That distinction became important, because the Square was a source of substantial revenues from the sale of commercial timber, all of which was being divided among the Hoopas. *Short*, 486 F.2d at 562.

Not surprisingly, the Yuroks were dissatisfied with those financial arrangements. In 1963, they sued the Secretary of the Interior, challenging his decision to exclude them from sharing in the revenue from the harvest of timber grown in the Square. Ten years later, the Court of Claims agreed with the Yuroks' position. *Id.* at 561. The Court of Claims held that the executive orders and congressional acts described above established a single reservation for the benefit of all the Indians who were living within its boundaries. The federal acts did not vest in any particular tribe rights to the Reservation's natural resources, at least not to the exclusion of any other tribe that was living in the Hoopa Valley. *Id.* at 567-68. Therefore, the Court of Claims concluded that all the "Indians of the reservation" were entitled to the proceeds from the sale of the Square's natural resources. *Id.* at 568.

After *Short* was decided, several Yuroks filed another action against the BIA and the Hoopa Tribe, alleging that those defendants had "violated their rights to participate in reservation administration and to benefit from the reservation's resources." *Puzz v. United States*, No. C80-2908-THE, 1988 WL 188462, at *1 (N.D. Cal. Apr. 8, 1988), order vacated Dec. 21, 1988 (dismissing as moot after passage of the Settlement Act). The crux of the Yuroks' complaint was that, although several tribes resided in the Hoopa Valley Reservation, only one tribe, the Hoopas, was allowed to administer it. As noted, the Hoopas had formed a tribal government in which non-Hoopa Indians were ineligible to participate. *Id.*

The district court agreed that the executive orders and congressional acts did not grant any territorial or political rights to the Hoopa Valley Tribe to the exclusion of other Indians living on the Reservation. *Id.* at *3. The court ordered the BIA to "exercise supervisory power over reservation administration, resource management, and spending of reservation funds, to ensure that all Indians receive the use and benefit of the reservation on an equal basis." *Id.* at *10.

Congress entered the fray 1988 with the Hoopa-Yurok Settlement Act ("Settlement Act"). 25 U.S.C. §§ 1300i-1300i-11. In the Settlement Act, Congress sought to establish a "fair and equitable settlement of the dispute relating to the ownership and management of the Hoopa Valley Reservation." Senate Report at 14. Congress did so by partitioning the Reservation. The Square became the Hoopa Valley Reservation, with the "unallotted trust land and assets . . . held in trust by the United States for the benefit of the Hoopa Valley Tribe," while the Extension became the Yurok Reservation, with a similar trust arrangement for the Yurok Tribe. 25 U.S.C. § 1300i-l(b) & (c).

Congress also established a Settlement Fund and authorized the Secretary to prepare a roster of all persons who could be considered "Indian[s] of the Reservation" as discussed by the Court of Claims in *Short*. 25 U.S.C. §§ 1300i-3 and 1300i-4. Moreover, as part of its plan to define the rights of the parties involved in the Settlement Act, Congress stated:

> The existing govening [sic] documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed.

25 U.S.C. § 1300i-7.

Congress provided that the partition of the Reservation, and the ratification and confirmation of the Hoopa Valley Tribe's

governing documents, were contingent on the Tribe's adopting a resolution that (i) waived any claim that the Tribe otherwise might have against the United States arising out of the Settlement Act, and (ii) consented to the establishment of the Settlement Fund. 25 U.S.C. § 1300i-l(a)(2)(A). The resolution had to be reviewed by the Secretary and published in the Federal Register, both of which occurred. 53 Fed. Reg. 49361 (Dec. 7, 1988).

D. The Present Dispute

Article IX of the Tribe's Constitution provides that the governing body of the Tribe is the Hoopa Valley Business Council (Council). The jurisdiction of the Tribe is set forth in Article III: "The jurisdiction of the Hoopa Valley Tribe shall extend to all lands within the confines of the Hoopa Valley Reservation boundaries . . . and to such other lands as may hereafter be acquired by or for the Hoopa Valley Indians." One of the Council's enumerated powers, found in Article IX, section (1)(l), is to

> safeguard and promote the peace, safety, morals, and general welfare of the Hoopa Valley Indians by regulating the conduct of trade and the use and disposition of property upon the reservation, provided that any ordinance directly affecting non-members of the Hoopa Valley Tribe shall be subject to the approval of the Commissioner of Indian Affairs . . . .

On January 28, 1995, pursuant to those constitutional provisions, and after a public notice and period for public comment, the Council adopted a timber-harvesting plan. The plan included a mitigation measure, adopted after consultation with the BIA, that was designed to protect certain sites of cultural significance to the Tribe. The plan established a one-half-mile buffer zone, where no timber could be harvested, around the White Deerskin Dance Ground. The White

Deerskin Dance Ground is located on a trail that winds through the Reservation, and on a portion of the Reservation called Bald Hill. The prohibition against harvesting timber applied to "tribal trust land, trust allotments, and fee land within the ½ mile buffer." Decision of Hoopa Valley Tribal Council: Alternative for FY 1995 Timber Sale Program (Jan. 28, 1995).

The parties dispute somewhat the religious centrality of the White Deerskin Dance, although they agree that it is of significant historical and cultural importance to the Tribe. The Tribe describes the dance as "a world renewal dance." The Tribe also asserts that the Bald Hill dance site "is the most important dance site of . . . all dances that the Tribe has . . . . The site is very ancient. There's scientific evidence that indicates that it could be one of the oldest dance sites, oldest ceremonies in the country." *Bugenig*, 25 Indian L. Rep. at 6139.

Shortly after the Council passed its timber-harvesting plan, Plaintiff purchased her property, which is located on Bald Hill within the buffer zone. Plaintiff applied to the California Department of Forestry and the County of Humboldt for a "timberland conversion" to convert approximately 2.5 acres of her land from timberland to pasture. The state granted the permit. Plaintiff then applied to the Tribe for a permit to haul logs over Reservation land. The Tribe denied the request. Nevertheless, Plaintiff sent the Tribe a check to cover the hauling fee, but the Tribe returned it to her. The Tribe also included a letter that explained the Tribe's position that, within the Square, "ONLY the Hoopa Valley Tribal Council has the authority to make land use changes."

Undeterred, Plaintiff began clearing timber, which she eventually hauled off her land. The Hoopa Valley Tribal Court issued a temporary restraining order and a notice of hearing. After the hearing, which Plaintiff declined to attend, the court issued a preliminary injunction enjoining her "from carrying out

any timber operations" within the buffer zone. Shortly thereafter, the state revoked Plaintiff's logging permit, stating that "no timber operations are allowed on significant historical or archaeological sites [defined as] sites that have significant or religious importance to California Indians."

After another hearing, the Tribal Court held that the Tribe "has the power and authority to define areas of sacred significance and, through establishment of the buffer no-cut zone in the Bald Hill area, has exercised that power." *Hoopa Valley Tribe v. Bugenig*, C-95-020, 25 Indian L. Rep. 6137, 6138 (July 11, 1996). In support of its decision, the Tribal Court cited *Montana v. United States*, 450 U.S. 544 (1981). The Tribal Court then found that Plaintiff had acted with "blatant disregard of tribal law." *Bugenig*, 25 Indian L. Rep. at 6138. Accordingly, the court issued a permanent injunction, which barred Plaintiff's logging activities in the buffer zone and ordered Plaintiff to undertake certain remedial measures respecting the trees that she already had felled. *Id.*

The injunction was affirmed on appeal by the Tribal Court of Appeals. That court held that the Tribe had acted pursuant to its inherent authority to regulate non-members' land in certain circumstances, and also pursuant to the express authority delegated to it by Congress in the Settlement Act. Plaintiff did not comply with the injunction. On October 11, 1996, the Tribal Court held her in civil contempt and ordered her to pay a sanction of $100.

Plaintiff then filed a complaint in the Northern District of California, seeking declaratory and injunctive relief. She argued that, because she is a non-Indian who owns her land in fee simple, neither the Tribe nor the tribal courts have regulatory or subject-matter jurisdiction over her land. The district court disagreed, holding that Congress, in the Settlement Act, had delegated authority to the Tribe to regulate all the lands within the Square, regardless of ownership.

Plaintiff filed this timely appeal.

STANDARD OF REVIEW

We review de novo a district court's decision concerning the scope of a tribe's authority to regulate matters affecting non-Indians. *Ariz. Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1132 (9th Cir. 1996). Additionally, the question whether Congress delegated regulatory jurisdiction to the Tribe in the Settlement Act involves the interpretation of a federal statute, which we likewise review de novo. *United States v. Fiorillo*, 186 F.3d 1136, 1146 (9th Cir. 1999), cert. denied, 528 U.S. 1142 (2000).

DISCUSSION

A. The Analytical Framework

At the outset, it bears repeating that certain important facts are undisputed: (1) The Square was created pursuant to an 1864 congressional act and an 1876 executive order; (2) the land that Plaintiff bought had become private property as a result of the operation of the 1887 General Allotment Act; and (3) in 1988, Congress partitioned the Hoopa Valley Reservation and ratified and confirmed the Tribe's governing documents.

Those facts are noteworthy because the Supreme Court has ruled that, after allotted land is conveyed to a non-Indian pursuant to the General Allotment Act, the Indian tribe loses "the right of absolute use and occupation of lands so conveyed" and no longer has "the incidental power to regulate the use of the lands by non-Indians." *South Dakota v. Bourland*, 508 U.S. 679, 688 (1993). The Court has observed that, although Congress eventually repudiated the policy behind the General Allotment Act, "'it defie[s] common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction.'" *Atkinson Trading Co. v. Shirley*, 121 S. Ct. 1825, 1830 n.1 (2001) (quoting *Montana*, 450 U.S. at 559 n.9).

This presumption against tribal jurisdiction over fee land owned by non-Indians within reservation boundaries is not absolute, however. The Supreme Court has set out three "limited exceptions" to the general rule. *Id.* at 1828-29. First, a tribe can regulate non-members on non-Indian fee land that is within a reservation if that power is delegated to the tribe by Congress. *Id.* at 1830; *United States v. Mazurie*, 419 U.S. 544, 553-54 (1975). The other two exceptions come from an Indian tribe's retained, inherent sovereignty to (a) "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" and to (b) "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-66; *see also Nevada v. Hicks*, 121 S. Ct. 2304, 2309-10 (2001). These two exceptions are the so-called *Montana* exceptions.

In the present case, the district court held that the first exception was satisfied; Congress, in the Settlement Act, delegated authority to the Tribe to regulate Plaintiff's land. That is, even if the Tribe no longer retained inherent authority to regulate timber harvesting on non-Indian land within the Reservation's boundaries in order to protect cultural resources, the Settlement Act gave the Tribe authority to do so.

There is ample support for the general proposition that Congress *can* delegate jurisdiction to an Indian tribe. The Supreme Court has stated, repeatedly, that Congress can delegate authority to an Indian tribe to regulate the conduct of non-Indians on non-Indian land that is within a reservation. *See, e.g., Atkinson Trading Co.*, 121 S. Ct. at 1830; *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997); *Bourland*, 508 U.S. at 694-95 & n. 15; *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 426 (1989) (White, J.)

(plurality opinion); *Montana*, 450 U.S. at 564; *Mazurie*, 419 U.S. at 553-54.

Whether Congress *actually* delegated authority here is a difficult question, however, because the Supreme Court has discussed only rarely the concept of express congressional delegation. Indeed, the only opinion in which the Court has done so in any depth is *Mazurie*. *See Cohen* at 253 (noting the paucity of cases discussing Congressional delegation of jurisdiction to Indians).

At issue in *Mazurie* was a tribal ordinance that required every liquor store located within the Wind River Reservation to obtain a tribal liquor license. The Wind River Tribes had enacted the ordinance pursuant to a federal statute that prohibited the introduction of alcoholic beverages into "Indian country," unless it was done in conformity with both state law and "an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country." 18 U.S.C. § 1161. For the purposes of § 1161, "Indian country" is defined as "all land within the limits of any Indian reservation," but excluding "fee-patented lands in non-Indian communities or rights-of-way through Indian reservations." 18 U.S.C. §§ 1151, 1154(c).

The defendants in *Mazurie* owned a bar on private, non-Indian fee land within the boundaries of the reservation. The land did not fit the definition of the statutory exclusion because, although the land was "fee-patented," it was not in a "non-Indian community." *Mazurie*, 419 U.S. at 550-52. Defendants, who were non-Indians, were arrested by federal officers for operating their bar without a tribal liquor license and were convicted in federal district court. The Court of Appeals reversed the convictions, holding that 18 U.S.C. § 1161 was an invalid congressional attempt to delegate

authority to Indian tribes. *Id.* at 550.[3] The Supreme Court reversed, holding that

> Congress has the constitutional authority to control the sale of alcoholic beverages by non-Indians on fee-patented land within the boundaries of an Indian reservation, and that Congress could validly make a delegation of this authority to a reservation's tribal council.

Id. at 546.

In reaching that conclusion, the Court first noted that Article 1, section 8, of the United States Constitution grants to Congress the power to regulate commerce "with the Indian Tribes." *Id.* at 554. This clause, the Court observed, combined with Court precedent, leaves no "room for doubt" that Congress has the power to regulate the sale of alcoholic beverages to Indians and to regulate the introduction of alcoholic beverages into Indian country, even if the affected land is owned by a non-Indian and even if the person regulated is a non-Indian. *Id.* at 554-56.

Having determined that Congress possessed the power to regulate the defendants' land and business, the Court then analyzed whether this power could be delegated to the Wind Valley Tribes. The Court said "yes." Although there are limits on the authority of Congress to delegate its legislative power,

> [t]hose limitations are . . . less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; they are a separate

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[3] The Tenth Circuit also had held that the statutory definition of the term "Indian country" was impermissibly vague, a ruling that the Supreme Court reversed. *Mazurie*, 419 U.S. at 552-53.

> people possessing the power of regulating their internal and social relations.

Id. at 556-57 (citations and internal quotation marks omitted); *see also Rice v. Rehner*, 463 U.S. 713, 730 (1983) (approving *Mazurie*'s holding after *Montana*); *Atkinson Trading Co.*, 121 S. Ct. at 1835 (citing *Mazurie* with approval).

Mazurie instructs that any determination that Congress expressly delegated to the Tribe authority to regulate logging on Plaintiff's land involves two distinct questions. *First*, we must be sure that Congress, in the Settlement Act, actually delegated regulatory authority to the Tribe. *Second*, if we conclude that Congress did delegate such authority, we must analyze whether that delegation was lawful. We answer each question in turn.

B. Did Congress Delegate to the Tribe Authority to Regulate Logging Activities on Fee Land in Order to Protect Cultural and Historical Resources?

The Tribe's delegation argument goes as follows: In § 1300i-7 of the Settlement Act, Congress stated that the "existing [governing] documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed." (Emphasis added.) That section, argues the Tribe, gave their 1972 Constitution, an "existing [governing] document," the force of law.[4]

Article III of the 1972 Constitution states that the "jurisdiction of the Hoopa Valley Tribe *shall extend to all lands within the confines of the Hoopa Valley Reservation boundaries as established by Executive Order of June 23, 1876*, and to such other lands as may hereafter be acquired by or for the Hoopa Valley Indians." (Emphasis added.) Article IX, section (1)(l),

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[4] The Tribe's 1952 Constitution was amended in 1972 and again approved by the Secretary.

states that the Hoopa Valley Business Council, the Tribe's "governing body," may regulate the "*use* and disposition *of property* upon the reservation, provided that *any ordinance directly affecting non-members* of the Hoopa Valley Tribe shall be subject to the approval of the Commissioner of Indian Affairs." (Emphasis added.) Therefore, the Tribe concludes, when Congress ratified and confirmed the Tribe's Constitution, Congress delegated power to the Tribe to regulate the use of all non-members' land that is within the boundaries of the Reservation, in certain circumstances.

In response, Plaintiff observes that the Supreme Court has ruled that any delegation of power to an Indian tribe to regulate a non-Indian must be express. Because the Settlement Act and the Tribe's Constitution are subject to varying interpretations, argues Plaintiff, they do not rise to the level of "express" delegation that the Supreme Court has required.

For the reasons that follow, we agree with the Tribe.

1. In the Settlement Act, Congress "Ratified and Confirmed" the Tribe's Constitution.

As with all matters of statutory interpretation, we begin by examining the statute's text. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Title 25 U.S.C. § 1300i-7 states that the Tribe's governing documents are "hereby ratified and confirmed." It is notable that Congress used those terms of art. Black's Law Dictionary 1135 (5th ed. 1979)[5] defines "ratification" as "the confirmation of a previous act[,] . . . [t]he affirmance . . . of a prior act . . . whereby the act . . . is given effect as if originally authorized." Similarly, "confirmation" is defined as to "give formal approval . . . . The ratification or approval of executive acts by a legislature." *Id.*

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[5] We examine the meaning of statutory terms as of the date of the enactment in question, *Perrin v. United States*, 444 U.S. 37, 42 (1979)—here, 1988.

at 270. Referring to the ordinary legal significance of the terms, when Congress "ratified and confirmed" the governing documents that were "heretofore recognized by the Secretary," Congress was authorizing, giving effect to, and formally approving the Tribe's 1972 Constitution.

The phrase "ratified and confirmed" has additional significance because it is the same phrase that Congress historically has used to give legal recognition to agreements between Native Americans and the United States. *See, e.g.*, Act of Feb. 28, 1877, 19 Stat. 254 (establishing that an agreement between the "Manypenny Commission" and the Sioux Indian Tribes was "ratified and confirmed"); Act of Mar. 3, 1891, 26 Stat. 1027, 1029 (establishing that two agreements between the Commissioner of Indian Affairs and the Coeur d'Alene Indian Tribe were "ratified and confirmed"); Curtis Act, 30 Stat. 495, 505 (establishing that an agreement between the Dawes Commission and the Choctaw and Chicksaw Tribes was "ratified and confirmed").[6]

Furthermore, in 1988, Congress was well aware of the significance of the term "ratified," for the Supreme Court recently had held that an agreement with an Indian tribe is given the force of law when "ratified" by Congress. In *Antoine v. Washington*, 420 U.S. 194 (1975), the Court had to interpret a statute "ratifying" an agreement between the Colville Confederated Tribes and the United States. *Id.* at 198 (quoting 34 Stat. 1015, 1050-1051 (1907)). The question before the Court was whether a provision in the ratified agreement preempted a Washington state law. The Washington Supreme

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[6] The Settlement Act, unlike the congressional acts cited, "ratified and confirmed" a tribal constitution, rather than an agreement between the United States and an Indian tribe. But the fact that Congress used the words that it typically uses when it gives the force of law to a document involving an Indian tribe still illuminates Congress' intent.

Court had interpreted the statute as *not* giving the agreement the force of law because the agreement was not a treaty. The Supreme Court disagreed, holding that, "[o]nce ratified by Act of Congress, the provisions of the agreements become law, and like treaties, the supreme law of the land." *Id.* at 204. We presume that Congress knew of this interpretation. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.").

In view of the usual meaning of the terms, their historic usage, and the Supreme Court's interpretation, the plain text of the Settlement Act establishes that, when Congress "ratified and confirmed" the Tribe's governing documents, it intended to give the Tribe's Constitution the force of law.

Our conclusion is buttressed by the legislative history, which makes clear that the Settlement Act was a response to confusion over who had the right to "make management decisions relating to the lands and resources of the 'Square' or, for that matter, the reservation as a whole." Senate Report at 9. The Senate Report explains that Congress' understanding of the law governing the Reservation was that, "absent statutory delegations," the Hoopas could not manage the Square. *Id.* The ratification and confirmation of the Tribe's Constitution was exactly that: a "statutory delegation[ ]" of authority to the Tribe to "make management decisions relating to the lands and resources of the 'Square.'"

The dissent argues that any delegation of authority to regulate non-members' land within the Reservation was not "consciously made" and hypothesizes that Congress' use of the words "ratified and confirmed" in § 1300i-7, when juxtaposed against Congress' repetition of those words in § 1300i-8, expressed Congress' intent to recognize the Tribe and the Yuroks as the "governing authorities of their respective reservations." (Dissent at 12917.) That forced parallelism will

not withstand contextual scrutiny. The phrase "ratified and confirmed" cannot exist in isolation; it requires an object. Section 1300i-8 "ratifies and confirms" the Yurok Tribe's status "as an Indian tribe," a status that was previously unrecognized, while § 1300i-7 "ratifies and confirms" the Hoopa Tribe's "[governing] *documents*." (Emphasis added.) As we have explained, the Hoopa Valley Tribe had a longstanding government, while the Yuroks had none.

In sum, the natural reading of § 1300i-7—confirmed by its context and history—is that Congress was giving legal force to the Tribe's governing body and governing documents, and that is the reading that we give it. We turn now to the meaning of the Tribe's Constitution with respect to the use of fee lands within the Reservation.

2. The Constitution Grants the Tribe Authority over Plaintiff's Land.

The Tribe points to two provisions of its constitution that, it claims, give it regulatory authority over Plaintiff's land in order to protect the Tribe's cultural and natural resources: Articles III and IX(1)(l). We agree that the plain text of those provisions supports the Tribe's position.

Article III states that the jurisdiction of the Hoopa Valley Tribe *shall extend to all lands within the confines of the Hoopa Valley Reservation boundaries as established by Executive Order of June 23, 1876*, and to such other lands as may hereafter be acquired by or for the Hoopa Valley Indians." (Emphasis added.) Article III is clear. The Tribe has jurisdiction over "all lands" within the borders of the Square.[7]

Plaintiff argues that the last clause of Article III, which refers to "such other lands," renders ambiguous the first clause, "shall

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[7] "Confines" means "border or limit; boundary." The American Heritage Dictionary 279 (1976).

extend to all lands within the confines" of the Reservation. Specifically, Plaintiff posits that, if the "other" lands that may be acquired later must be "acquired by or for the Hoopa Valley Indians," then the original lands referred to in the first clause also must be assumed to include only lands "acquired by or for the Hoopa Valley Indians" and thus must be assumed to exclude fee lands owned by non-Indians.

Plaintiff's reading of Article III is labored; it gives too much weight to the word "other" and gives too little weight to the word "all." Article III's reference to "all lands within the confines of the Hoopa Valley Reservation boundaries as established by Executive Order of June 23, 1876, "means the Square. "[O]ther lands" simply adds to the first clause—lands in addition to the Square, which may be acquired later by or for the Tribe.

Plaintiff also argues that the reference to "such other lands as may hereafter be acquired" must mean all land that the Tribe did not own at the time of the Settlement Act, including fee land such as hers. Under that interpretation, fee land does not qualify for inclusion in "all lands within the confines of the Hoopa Valley Reservation boundaries." To read Article III otherwise, she says, would be to make the second clause "surplusage."

That conclusion does not follow. The "such other lands" clause refers to a meaningful category of lands—lands outside the Square—that could be acquired later, but that do not fall within the category of "all lands" within the Square.

Our understanding of Article II1 makes perfect sense when it is read in the light of the overall historical context. The first clause of Article III refers to "*all* lands within the confines of the Hoopa Valley Reservation *boundaries as established by Executive Order of June 23, 1876.*" (Emphasis added.) At that time, there was no fee land yet checkerboarding the Reservation, because the General Allotment Act was not passed

until 1887. Thus, our reading of the first clause gives meaning to the historical reference in Article III, while Plaintiff's does not.

Additionally, the Indian Reorganization Act authorizes the Secretary of the Interior to acquire land for Indians "within or without existing reservations," 25 U.S.C. § 465, and to "add such lands to existing reservations," 25 U.S.C. § 467. The second clause of Article III appears to be designed to foresee that contingency, extending tribal jurisdiction over any new lands so acquired.

In short, Article III provides that the Tribe has jurisdiction over "all lands" within the borders of the Square. We conclude that this assertion of jurisdiction includes Plaintiff's land.

The second provision on which the Tribe relies is Article IX(1)(l). Article IX sets out the "powers" of the Hoopa Valley Business Council Section 1(l) grants the Council the power to

> safeguard and promote the peace, safety, morals, and general welfare of the Hoopa Valley Indians by regulating the conduct of trade and the use and disposition of property upon the reservation, provided that any ordinance directly affecting non-members of the Hoopa Valley Tribe shall be subject to the approval of the Commissioner of Indian Affairs . . . .

(Emphasis added.)

That provision unambiguously contemplates tribal regulation of the use of property upon the reservation, even if the regulation affects "non-members." Plaintiff acknowledges that Article IX(1)(l) refers to non-members as individuals, but notes that it does not refer to non-members' *fee* lands. Again, we are not persuaded.

Plaintiff's position is that fee lands owned by non-Indians do not count as "property upon the reservation."[8] In view of our reading of Article III, however, we believe that Article IX(1)(l) plainly refers to all property upon the Square, whoever owns it.

Moreover, Plaintiff's reading of Article IX(1)(l) would make some of its provisions meaningless. The proviso that "*any* ordinance directly affecting non-members" is subject to approval contains no further limitation; that is, it assumes that any of the kinds of ordinances covered by Article IX(1)(l) could affect non-members. (Emphasis added.) Plaintiff's interpretation gives full force to the grant of power to regulate non-members' "conduct of trade" but would give no force to the grant of power 'to regulate non-members' "use and disposition of property." If the Tribe could not regulate non-members' fee lands, there would be no reason to provide for approval of ordinances that affect for example, non-members' "disposition of property upon the reservation."

Like Article III, Article IX(1)(l) is unambiguous. It states unequivocally that the Council can pass an ordinance that affects non-members and their lands, so long as the ordinance safeguards and promotes the peace, safety, morals, and general welfare of the Tribe and is approved by the Commissioner of Indian Affairs. An ordinance that is designed to protect a tribe's significant historical and cultural resources "safeguard[s] and promote[s] the peace, safety, morals, and general welfare" of the tribe. It is undisputed that the ordinance was approved by the Commissioner of Indian Affairs.

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[8] Plaintiff does not argue that "property" refers only to personal property, rather than real property, and indeed Article IX(1)(l) would not support such a limitation.

Under Article III and Article IX(1)(l), then, the Tribe had the power to pass the ordinance that affected Plaintiff's logging activity on her fee land within the borders of the Reservation.[9]

3. Read Together with the Tribal Constitution, the Settlement Act is an Express Delegation to the Tribe.

Plaintiff argues that, even if the Settlement Act and the Tribal Constitution, read together, constitute a delegation of authority to the Tribe, it is not the kind of "express" authorization that the Supreme Court has required before a tribe may regulate non-Indian lands that are within a reservation's boundaries. *See Strate*, 520 U.S. at 445 ("Our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nomnembers exists only in limited circumstances."). We come to the opposite conclusion.

As the preceding analysis establishes, neither the Settlement Act nor the Tribe's Constitution contains any ambiguity. When Congress ratified and confirmed the Tribe's Constitution, Congress delegated authority to the Tribe to regulate all the lands within the Square, including that owned by Plaintiff.

We presume, as we must, that Congress understood the contents of the governing documents that it ratified and confirmed. As the Supreme Court has taught, the argument that "Congress was unaware of what it accomplished or that it was misled by the groups that appeared before it" lacks force. *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). "If this test were

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[9] When Congress enacted the Settlement Act in 1988, the Tribe did not yet have delegated authority to regulate private land, notwithstanding the provisions of Article III and Article IX(1)(l). The Tribe may have retained *inherent* authority to do so, but we need not decide whether it had inherent authority. Even if the tribal assertion of jurisdiction over non-members' fee lands within the Reservation was *ultra vires* in 1972, Congress "ratified and confirmed" the Tribe's Constitution in 1988—that is, it validated and confirmed the Tribe's previous act.

applied literally to every member of any legislature that ever voted on a law, there would be very few laws which would survive it." *Id.* If the text of a statute is clear, as it is here, we must assume that "Congress intended what it enacted." *Id.*

Even if that presumption did not apply, the events surrounding the enactment of the Settlement Act show that Congress understood the scope of its delegation. As noted, the legislative history makes clear that Congress was under the impression that, "absent statutory delegations," the Hoopas could not "make management decisions relating to the lands and resources of the 'Square.'" Senate Report at 9.

The Tribe had been attempting to make such "management decisions" before Congress enacted the Settlement Act. In doing so, the Tribe took the position that its constitution enabled it to promulgate ordinances affecting non-members and their fee lands within the Square. For example, section 1.1.04 of the Law and Order Code of the Hoopa Valley Tribe, which was enacted in 1986, asserts that

> the effective area of this Code shall include all territory within the Hoopa Valley Indian Reservation, as defined by . . . the Hoopa Tribal Constitution, including fee patent lands, allottments [sic], assignments . . . and existing and future lands outside the boundaries of the Reservation owned or controlled by the Hoopa Valley Tribe.

Similarly, the Comprehensive Plan for the Hoopa Valley Indian Reservation, adopted in 1973, grants the Tribe's government the power to "provide for assessments or license fees . . . [of] all commercial ventures within the limits of the Reservation," while at the same time acknowledging that "95 percent of all commercial business services are owned by non-Indians and are located on former Tribal land." Hoopa Valley Indian Reservation Comprehensive Plan §§ 1.604, 1.608 (adopted June 21, 1973).

Moreover, it is significant that the ratification of the Tribe's Constitution was not self-executing. Instead, its implementation was contingent on actions that were to occur within sixty days alter the Act's passage. Section 1300i-1(a)(2)(A) provided that the partition of the reservation and the ratification and confirmation of the Tribe's governing documents would occur only if the Tribe passed a resolution waiving claims against the United States and consenting to the Settlement Fund. The tribal resolution had to be approved by the Secretary and published in the Federal Register.

The Tribe passed the requisite resolution and had it approved by the Secretary and published in the Federal Register. The resolution sheds more light on the circumstances surrounding the Settlement Act. It stated, among other things, that the *Puzz* and *Short* cases had "crippled the power of the Hoopa Valley Business Council to exercise *the authorit[y] granted under the Tribe's Constitution . . . to govern non-members*." 53 Fed. Reg. at 49361 (emphasis added). With the Settlement Act, Congress expressly gave that authority to the Tribe.

After that resolution was published and approved, Congress amended the Settlement Act, *see* Pub. L. 101-301, but it did nothing to alter the Tribe's interpretation, which the Secretary had approved, and which had been duly published. "Although postenactment developments cannot be accorded the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose" of the statute. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) (citation and internal quotation marks omitted). When "an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *Id.* (citation and internal quotation marks omitted).

We acknowledge that the Settlement Act does not contain a detailed explanation, such as "we hereby delegate to the Tribe the power to regulate all lands within the Reservation, notwithstanding any patent owned by non-Indians." But no particular verbal formula is required.

On this issue, we agree with the District of Columbia Circuit's opinion in *Arizona Public Service Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000), *cert. denied*, 121 S. Ct. 1600 (2001). There, the court responded to an argument that because Congress had, in the past, delegated authority to regulate non-Indians to Indian tribes by using the words "notwithstanding the issuance of any patent," any delegation that did not use these words could not be an express delegation of authority to regulate non members. The court disagreed and observed: "That a provision uses a new formulation is not dispositive of the question as to whether it constitutes an express delegation." 211 F.3d at 1289.

The Settlement Act is not ambiguous. When Congress ratified and confirmed the Tribe's Constitution, it gave that constitution the force of law. Neither is the Tribe's Constitution ambiguous. It contemplates regulation of all land within the Square, in order to protect the general welfare of the Tribe, even if that regulation affects the use of lands owned in fee by non-members. In sum, when the Tribe passed the ordinance, it was acting pursuant to authority expressly granted by Congress.

C. Could Congress Delegate That Authority to the Tribe?

Plaintiff's final argument is that Congress *could not* delegate such authority to the Tribe, even if it meant to. Plaintiff asserts that "there is no authority or precedent for finding that an Act of Congress can take regulatory jurisdiction over fee-simple non-Indian owned property away from a state government and give it to a tribe."

Plaintiff has framed the question incorrectly, because her question assumes that state and federal jurisdiction cannot exist

simultaneously over fee-patented land within a reservation. It is true that a state has some jurisdiction over fee-patented land within an Indian reservation. *E.g.*, *County of Yakima*, 502 U.S. at 257-58, 268; *Cohen* at 352. It also is true, however, that federal jurisdiction reaches activities that occur on fee patented land within a reservation. *E.g.*, 18 U.S.C. §§ 1151, 1152; *Mazurie*, 419 U.S. at 555. Put differently, the want of state regulatory jurisdiction over land is not a necessary condition for federal, regulatory jurisdiction over the same land. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980) (explaining preemption law applicable to Indian reservations).[10] In fact, the Supreme Court has suggested that *tribal* jurisdiction and state jurisdiction are not mutually exclusive. *See Brendale*, 492 U.S. at 440 n.3 ("The possibility that the county might have jurisdiction to prohibit certain land uses . . . does not suggest that the Tribe lacks similar authority.") (Stevens, J.) (plurality opinion); *see also Confederated Tribes v. Washington*, 591 F.2d 89 (9th Cir. 1979) (holding that tribal fishing regulations on waters within the Colville Reservation did not preempt state fishing regulations concerning the same waters).

Regardless, the question whether California may also have jurisdiction over Plaintiff's land is not before us; we are concerned only with whether Congress, in order to protect sites of cultural or religious significance to a tribe, can regulate timber harvesting on private property that is located within a reservation and, if so, whether it can delegate that power to the Tribe. The answer to both questions is "yes."

1. Congress has Plenary Jurisdiction over the Reservation.

Congress' power over Native American affairs "is unusual in our federal system because it includes general federal authority

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[10] This principle is not unique to fee-patented lands within the borders of Indian reservations. The use of private property routinely is subject to regulation by both the federal and state governments.

to legislate over health, safety, and morals." *Cohen* at 219. It is "now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making." *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1983) (citing U.S. Const. art. I, § 8, cl. 3; U.S. Const. art. II, § 2, cl. 2). The Supreme Court has referred to Congress' power over Indian affairs as "plenary" and has noted that,

> "in the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them needing protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic."

Morton v. Mancari, 417 U.S. 535, 552 (1974) (quoting *Bd. of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943)). Of course, the power of Congress in Indian affairs, although "plenary," is not absolute; it must be "rationally related" to the protection of Indians. *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 86 (1977).

It is clear that Congress, exercising its plenary power over Indian tribes, could enact the ordinance in question and could regulate all the land within the Reservation that is owned by the Tribe or held in trust for the Tribe. *White Mountain Apache Tribe*, 448 U.S. at 145-46. And we do not read the Supreme Court's cases as holding that Congress' plenary power to act on behalf of Native Americans necessarily ends at the border of allotted land, owned by a non-Indian, that is located wholly within a reservation. Rather, although the ownership status of

land is one factor in determining the jurisdictional reach of the federal government, it is not dispositive.

As we noted earlier, the Court has held that Congress can delegate to an Indian tribe the power to regulate a private landowner whose property is located wholly within a reservation. *E.g*, *Montana*, 450 U.S. at 564. By necessary implication, it follows that Congress itself could regulate the same property in the first instance.

A more express version of that proposition is found in *Mazurie*, in which the Court noted that the federal government retains authority, under its Indian Commerce Clause power, to regulate the use of land within a reservation that is owned by a non-Indian, if the regulation—in that case, a regulation pertaining to the sale of alcohol—is meant to benefit the tribe. 419 U.S. at 555. Indeed, the Court in *Mazurie* upheld the constitutionality of 18 U.S.C. § 1151, which defines "Indian country," the purposes of federal criminal jurisdiction, as including fee-patented lands. *Id.* at 555.[11]

The Court in *Mazurie* was guided by two other cases, *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962), and *Perrin v. United States*, 232 U.S. 478 (1914). In *Seymour*, the Court held that the federal government had jurisdiction over a crime committed by an Indian on land patented in fee to a non-Indian. 368 U.S. at 358. In so holding, the Court reasoned that making criminal jurisdiction dependent on land ownership would create an "impractical pattern of checkerboard jurisdiction," which would be unworkable. *Id.*

Similarly, in *Perrin*, the Court held that the federal government could regulate the sale of alcohol on surplus lands that were *formerly* part of a reservation (as distinct from allotted land

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[11] Other cases have extended 18 U.S.C. § 1151 to include civil jurisdiction. *E.g.*, *DeCoteau v. Dist. County Court*, 420 U.S. 425, 427 n.2 (1975).

within a reservation.), but now were owned by non-Indians. 232 U.S. at 486-87. The defendant argued that the federal regulation exceeded the power of Congress, but the Court disagreed. Congress did have the authority to protect the tribe:

> As the power is incident only to the presence of the Indians and their status as wards of the Government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis.

Id. at 486.

Mazurie, *Seymour*, and *Perrin* establish that, when evaluating a regulation aimed at protecting a tribe, land ownership and tribal membership are not determinative of jurisdiction. More support for that proposition can be found in the legal doctrine that has developed around the "surplus land act" cases, in which the Court has attempted to define the applicable jurisdictional regime on unallotted surplus reservation lands that Congress opened to non-Indian settlement. Generally, the Court has instructed, the states have jurisdiction over unallotted surplus lands "if the applicable surplus land act . . . diminished the reservation boundaries." *Solem*, 465 U.S. at 467. By contrast, if a surplus land act "simply offered non-Indians the opportunity to purchase land within established reservation boundaries, then the entire opened area remained Indian country," including non-Indian fee land, and was subject to federal regulation. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (citation and internal quotation marks omitted).

In those cases, the Court has determined jurisdiction by examining the text of the surplus land act in question, as well as the historical context surrounding the act and the subsequent

treatment of the land. *Id.* at 344. Notably, in *Solem*, the Court observed that, "[o]nce a block of land is set aside for an Indian Reservation *and no matter what happens to the title of individual plots within the area*, the entire block retains its reservation status until Congress explicitly indicates otherwise." 465 U.S. at 470 (emphasis added).

From that jurisprudence we derive support for the principle that federal jurisdiction within a reservation is not dependent solely on the ownership status of the land in question. Instead, following the cases described above, we must (a) examine whether Congress intended to divest itself of all jurisdiction when it authorized allotment of the Reservation, and (b) then determining whether the ordinance is necessary for the protection of the Tribe.

a. Congress Retained Jurisdiction After Allotment.

We do not believe that Congress intended to divest itself of jurisdiction in this case. The Hoopa Valley Reservation, even after allotment, remains 97.2 percent intact. Less than one percent of the land is owned in fee simple by non-Indians. Again, reasoning by analogy to the surplus land act cases, when determining Congress' intent to divest itself of jurisdiction, "Congress's own treatment of the affected areas . . . has some evidentiary value, as does the manner in which the [BIA] and local judicial authorities dealt with unallotted open lands." *Solem*, 465 U.S. at 471. Here, less than one percent of the land is owned in fee by non-Indians, due primarily to the federal government's own unwillingness to authorize large-scale allotment in the Square. *See* Nelson at 195-96 (summarizing the history of allotment on the Hoopa Valley Reservation). That unwillingness also is illustrated by Congress' failure to pass an allotment act that was directed *specifically* to the Hoopa Valley Reservation, as it did for several other reservations. *See Mattz*, 412 U.S. at 497 (noting that "Congress occasionally

enacted special legislation in order to assure that a particular reservation was in fact opened to allotment").

The Supreme Court's opinion in *Mattz* is especially instructive. There, the question for the Court was whether the Klamath River Indian Reservation (i.e., the Extension) was terminated by congressional act, or whether it remained "Indian country." The State of California argued for the former result. It reasoned that, although in 1891 the Extension was joined to the Square, in 1892 Congress passed an "act to provide for the disposition and sale of lands known as the Klamath River Indian Reservation," which opened the Extension to allotment to Indians and to homesteading by non-Indians. *Id.* at 494-95. The 1892 statute, said the state, extinguished the entire Extension's "reservation status." *Id.* at 496.

The Supreme Court disagreed. The Court noted that the 1892 act was similar to the 1887 General Allotment Act, in which Congress had established its intention "to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When *all the lands had been allotted* and the trust expired, the reservation could be abolished." *Id.* (emphasis added). The Court determined that the provisions of the 1892 Act "do not differ materially from those of the General Allotment Act of 1887" and, therefore, "allotment under the 1892 Act *is completely consistent with continued reservation status.*" *Id.* at 497 (emphasis added). The Court then stated that "'when Congress has once established a reservation *all tracts included within it remain a part of the reservation* until separated therefrom by Congress.'" *Id.* at 504-05 (emphasis added) (quoting *United States v. Celestine*, 215 U.S. 278, 285 (1909)).

As we have noted, the Supreme Court also has held that land retains its "reservation status" after being ceded to non-Indians under a surplus land act and, thus, may be subject to federal jurisdiction. This is in contrast to a statute that diminished the

reservation boundaries, leaving the non-Indian fee land outside the reservation. *See Yankton Sioux Tribe*, 522 U.S. at 333, 343 (evaluating whether a landfill was subject to federal environmental regulations by determining whether the land, which was owned in fee by a non-Indian, was still a part of the reservation, and concluding that it was not part of the reservation). The key to determining "reservation status" is Congressional intent. *Id.* at 343. And *Mattz* establishes that Congress meant for tracts of land within a reservation that were allotted pursuant to the General Allotment Act to retain their reservation status until all reservation lands eventually could be allotted and the reservation could be abolished. 412 U.S. at 496.

The foregoing analysis, combined with *Mazurie*'s holding that it is constitutional for Congress to regulate non-Indians' conduct on privately owned, allotted land within a reservation, leads us to conclude that Plaintiff's land—which is wholly within a reservation and which was allotted pursuant to the General Allotment Act—remains subject to plenary federal jurisdiction.

It is true, as Plaintiff points out, that the Court has stated that it "defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction." *Montana*, 450 U.S. at 559 n.9. However, that statement was a reference to a tribe's inherent authority, not to the jurisdiction of the United States that may have remained after allotment. *Id.*

Moreover, even concerning a tribe's remaining inherent authority, the Court recently held that Congress "could not have intended," in enacting the General Allotment Act, "that tribes would lose control over the character of their reservations upon the sale of a *few, relatively small parcels of land*." *Brendale*, 492 U.S. at 441 (Stevens, J.) (plurality opinion) (emphasis added). In *Brendale*, the Court, in a fractured opinion, held that

an Indian tribe retains authority to zone a non-Indian's fee land that is within a "closed" part of a reservation. *Id.* We believe that the same can be said of Congress' plenary authority over the Square. Congress could not have intended, after "the sale of a few, relatively small parcels of land," *id.*, to lose its power to pass regulations that protect the Tribe, including regulations that encompass the entire Reservation.

b. The Ordinance Protects the Tribe.

The ordinance in question, like the regulations in *Mazurie*, *Perrin*, and *Brendale*, is a role of general applicability that is intended to protect "the internal and social relations of tribal life." *Mazurie*, 419 U.S. at 557. While Plaintiff has deconstructed the ordinance into a regulation that is only about cutting trees, we view it more holistically as a reasonable means to preserve and protect tribal resources that possess significant historical and religious value. We see no principled reason why the federal government can prohibit a non-Indian from selling alcohol on land that he owns in fee within a reservation, in order to protect the physical health of an Indian tribe, but cannot prohibit a non-Indian from using such lands so as to put the spiritual health of a tribe at risk.

We conclude, then, that the federal government did retain jurisdiction to protect the cultural and natural resources of the Reservation, despite the fact that land owned by non-Indians would be affected by such regulation.

2. Congress Could Delegate that Authority to the Tribe.

Finally, we must determine whether Congress could delegate that regulatory authority to the Tribe. Again, we look to *Mazurie* for our answer. There, the Court noted that, although there are "limits on the authority of Congress to delegate its legislative power," those limits are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." 419

U.S. at 556-57. Indian tribes, the Court observed, "are unique aggregations possessing attributes of sovereignty over both their members and their territory." *Id.* at 557; *see also Atkinson Trading Co.*, 121 S. Ct. at 1835 (citing *Mazurie* with approval).

This case, like *Mazurie*, involves the regulation of a non-Indian's conduct on land owned by a non-Indian wholly within the boundaries of a reservation. As in *Mazurie*, the ordinance at issue affects "the internal and social relations of tribal life," a subject as to which the Tribe retains at least some independent authority. 419 U.S. at 557; *see also Brendale*, 492 U.S. at 441 (holding that an Indian tribe retained inherent authority to zone land held in fee by a non-member in a closed area of a reservation); *Montana*, 450 U.S. at 566 (noting that Indian tribes retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within the reservation "when that conduct threatens or has some direct effect on the . . . health or welfare of the tribe").[12]

Plaintiff also argues that Congress could not delegate regulatory power to the Tribe because she cannot become a member of the Tribe and therefore cannot participate in its government. The Court in *Mazurie* rejected a similar argument, noting that non-members were protected from arbitrary tribal conduct in at least two ways: (1) by 25 U.S.C. § 1302, which applies constitutional prohibitions to tribal governments; and (2) by the fact that the tribal ordinances had to be approved by the

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[12] The Court's reference to Indian tribes' "independent authority over the subject matter" is not an instruction for us to undertake a *Montana*-like analysis to see whether the Tribe actually retains inherent authority over Plaintiff's land. Instead, we read the Court to mean only that Congress can delegate to Indian tribes those powers that are within the sphere of the Indian Commerce Clause—powers that are "rationally related" to the protection of Indians. *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 86 (1977). Congress could not, for example, delegate to a tribe the power to regulate commerce with foreign nations.

Secretary. 419 U.S. at 558 n.12. The same is true here. Section 1302 applies to the Tribe and, pursuant to the Tribe's Constitution, any ordinance directly affecting non-members must be approved by the Secretary—as this ordinance was.

Because the Tribe possesses unique "attributes of sovereignty," and because the Tribe has at least some "independent authority over the subject matter" at issue, we hold that the federal government could delegate to the Tribe its authority to protect cultural and historical resources of significance, "even though the lands were held in fee by non-Indians, and even though the persons regulated were non-Indians." *Mazurie*, 419 U.S. at 554, 557.

CONCLUSION

We hold that Congress expressly delegated authority to the Tribe to enact the ordinance in question and that Congress had the power to do so.

AFFIRMED.

FERNANDEZ, Circuit Judge, with whom KLEINFELD and WARDLAW, Circuit Judges, join, Dissenting:

Because I disagree with the majority's holding that Congress has expressly conferred jurisdiction upon the Hoopa Valley Tribe over lands held in fee by non-Indians, I dissent.

In reaching this conclusion, I have given, as I must, the greatest deference to the Supreme Court's insistence that jurisdiction over non-Indians on non-Indian land is exceptional. That is because tribes have limited authority and jurisdiction over non-Indians. *See Atkinson Trading Co., Inc. v. Shirley*, __ U.S __, __, 121 S. Ct. 1825, 1830, 149 L. Ed. 2d 889 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438, 446, 117 S. Ct. 1404, 1409-10, 137 L. Ed. 2d 661 (1997); *Montana v. United States*, 450 U.S. 544, 549, 101 S. Ct. 1245, 1250, 67 L. Ed. 2d 493 (1981). That limitation is surely proper and should be treated with respect, especially in light of the fact that if jurisdiction exists non-Indians will have no representation in the government or councils of the tribes, but will be subjected to the demands of a separate sovereign within the boundaries of the United States itself.[1] Thus, before finding that Congress has expressly authorized a tribe to assert jurisdiction over non indians and their lands, the authorization should, in my view, be truly pellucid. We should not have to ferret it out in the midst of a fuliginous cloud of words. We should expect great clarity when Congress is ceding sovereignty to entities in which those

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[1] As the Court recently noted: "Hitherto, the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." *Nevada v. Hicks*, __U.S. __, __,121 S. Ct. 2304, 2310, 69 L. Ed. 2d 4528 (2001). That, it seems to me, lays bare the fundamental fact that the scope of the jurisdiction asserted here is truly unusual.

who are affected will have no say. With that in mind, I turn to the issue at hand.

The original panel set out the issue in words that cannot easily be improved upon. I shan't try, but will instead rather extensively quote its language.

> The statutory provision at issue provides, in full, as follows: "The existing governing documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed." 25 U.S.C. § 1300i-7.
>
> The fact that nothing in the Settlement Act itself explicitly confers upon the Tribe jurisdiction to regulate nonmembers raises serious questions as to how carefully Congress considered whether it was making any grant of regulatory authority to the Tribe. Moreover, the Settlement Act uses the same "ratified and confirmed" language to recognize the newly created Yurok Tribe, 25 U.S.C. § 1300i-8, which suggests that this language may simply represent Congress's attempt to establish the Hoopa Valley Tribe and the Yurok Tribe as the governing authorities for their respective reservations, rather than a consciously made delegation of authority to the tribes to exercise jurisdiction over nonmembers. Indeed, legislative history makes clear that Congress's overriding concern in passing the Settlement Act was ending the acrimonious disputes between the Hoopa and non-Hoopa Indians living in the Hoopa Valley by creating two separate reservations, one for the Hoopa and one for the Yurok, in which each group would be free to govern itself without interference from the other. *See, e.g.*, 134 Cong. Rec. S13967-02, 1988 WL 177595, at

*34 (Sept. 30, 1988) (statement of Sen. Inouye) (explaining the Hoopa Tribe's loss of its ability to govern the area that ultimately became its exclusive reservation); 134 Cong. Rec. H9406-01, 1988 WL 176807, at *35 (Oct. 3, 1988) (statement of Rep. Bosco) (explaining the Settlement Act as "lay[ing] the groundwork for strong, healthy tribal communities"). The legislative history contains no indication that Congress considered giving or intended to give the Tribe authority to exercise jurisdiction over fee-patented land owned by non-Indians such as Bugenig.

Despite this ambiguity with respect to the Settlement Act as a grant of power over tribal nonmembers, the district court interpreted § 1300i-7 as a congressional delegation of authority to the Tribe to exercise such jurisdiction. The district court reasoned that § 1300i-7's "ratified and confirmed" language works to "give[ ] every clause in the document being ratified the full force and effect of a congressional statute." Turning to the Tribe's governing documents, the district court looked to Article III of the Tribal Constitution, which provides that the Tribe has jurisdiction over "all lands within the confines of the Hoopa Valley Indian Reservation boundaries as established by Executive Order of June 23, 1876, and to such other lands as may hereafter be acquired by or for the Hoopa Valley Indians." The district court held that "under the plain language of Article III, the Hoopa Valley Tribe has jurisdiction over Bugenig's land" as land located within the boundaries of the reservation.

Bugenig v. Hoopa Valley Tribe, 229 F.3d 1210, 1215-16 (9th Cir. 2000) (*Bugenig I*).[2]

As I see it, the district court was surely wrong when it determined that the language in question clearly conferred jurisdiction over non-Indians on non-Indian land within the boundaries of the reservation. There is not a whisper of that in the language in question; nor is there any reason to think that Congress divined that intention lurking in the words. To assume that jurisdiction means a general plenary jurisdiction over others and that all we need to do is ruminate on its territorial scope is to beg the question.

As it is, there is nothing remarkable about a tribal constitution's declaration that the reach of tribal authority will extend to its own boundaries, and that is all the language at hand declares. That is a far cry from saying that the tribe will have unrestricted authority to regulate the use of non-Indian land within those boundaries, regardless of the fact that a tribe generally has no such powers. Still, there are occasions when a tribe is empowered to regulate others, even without an express conferral of jurisdiction by Congress. The Supreme Court said as much before this tribal constitution was ratified by Congress, and Congress must have been aware of that. I speak, of course, of the so-called *Montana* exceptions. *See Montana*, 450 U.S. at 565-66, 101 S. Ct. at 1258. Those exceptions have been carefully circumscribed. *See, e.g.*, *Atkinson Trading*, __ U.S. at __, 121 S. Ct. at 1832-35 (2001.); *County of Lewis v. Allen*, 163 F.3d 509, 515 (9th Cir. 1998). Nonetheless, the exceptions

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[2] The district court also pointed to Article IX, § 1(1) of the constitution, which allows regulation of trade and the use and disposition of property, if the Commissioner of Indian Affairs approves of it. However, as the panel pointed out, that language appears to do no more than allow for regulation of "consensual commercial dealings between tribal members and nonmembers." *Bugenig I*, 229 F.3d at 1216.

do exist, and a tribe whose jurisdiction does not extend to non-Indian land when they do exist might well find that it could not "'protect tribal self-government or . . . control internal relations.'" *Atkinson Trading*, __ U.S. at __, 121 S. Ct. at 1835 (20011) (citation omitted). In that sense, then, it is perfectly reasonable to believe that when the Tribe drafted its constitution, it intended to reach out and accept all jurisdiction that properly belonged to it, but there is no reason to believe that Congress read the constitution's bland language as a power grab over land and peoples not related to the Tribe itself or to its government. The Tribe simply could not authorize itself to do that. We should not act as if it could, or as if Congress thought that the Tribe had tried to do so and then ratified the attempt. Nor should we decide that by using the constitution's unexceptional language the Tribe, like a retiarius, ensnared and skewered Congress, thereby obtaining exceptional jurisdiction.

I would, therefore, hold that the language in question, even coupled with the ratification statute, was not an express conferral of additional authority or jurisdiction, but, rather, a mere confirmation of the general jurisdictional rights that every tribe must have.[3]

That being said, I see no real need to explore the outer limits of the meaning of express authorization. Wherever they may be, the language of the tribal constitution did not reach them. The panel found a mere ambiguity in the language. *Bugenig I*, 229 F.3d at 1216-17. With all due respect, I believe that in doing so

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[3] Incidentally, when the provision in question is read as a whole it can also be seen as an express limitation of jurisdiction to land that is held "by or for the Hoopa Valley Indians." That is, when it refers to "other lands" acquired "by or for" the Indians, implicit in that is the thought that the words "all lands within the confines of . . . Reservation boundaries" also concerns those that are "by or for" the Hoopa Valley Indians. I eschew that reading, however, lest it foreclose tribal jurisdiction under circumstances when the *Montana* exceptions would allow it.

it conceded too much. Because it did, however, the panel felt the need to press on. I consider that to be a divagation, but to those who are interested in exploring the subject, I commend the panel's discussion. *See id.* at 1216-19.

Once the express authorization issue is resolved as I have resolved it, the next question is whether the Tribe's desire to protect the area in question is sufficient to bring its assertion of regulatory power over non-Indian lands within the *Montana* exception for "conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566, 101 S. Ct. at 1258. As the Court has told us, that would require that the impact of the non-Indian conduct was "demonstrably serious" and regulation was necessary to "protect tribal self-government or to control internal relations." *Atkinson Trading*, __ U.S. at __, 121 S. Ct. at 1835 (2001) (citations and internal quotation marks omitted). The district court did not really explore those issues which are, to say the least, fact intensive. Thus, I would remand this case so that the district court could further develop the record and decide in the first instance whether the exception does apply.

In sum, it seems plain to me that the Hoopa Valley Tribe's constitution could not, and did not, reserve or confer upon the tribe what it did not have and could only obtain through a separate express gift from Congress—plenary jurisdiction over other peoples' lands. It seems equally plain that on its face the constitution did no more than reserve all of the jurisdiction that it could reserve—jurisdiction over tribal lands and, in special circumstances, jurisdiction over non-tribal lands as well. So plain it seems, it would take a marvelous act of interpretation, bordering on thaumaturgy, to read the constitution as expanding

the Tribe's jurisdictional reach beyond the norm. There is no reason to believe that Congress did so.[4]

Thus, I respectfully dissent.

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[4] Because my framing of the nature of the problem may mislead some regarding my position, see for example the majority opinion at 12898, let me be, perhaps redundantly, explicit. I would not hold that an inattentive or ill-informed Congress misunderstood the plain meaning of its own enactment, or the proper reading of the provisions of the tribal constitution. I would hold, instead, that the plain and proper reading of the tribal constitution is what I have already indicated, and that Congress must be deemed to have understood just that, rather than the creative reading now pressed upon us.

Appendix B–1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED: February 28, 2001

ROBERTA BUGENIG,	)
	) No. 99-15654
Plaintiff-Appellant,	)
	) DC No. CV-98-03409-CW
v.	)
	) ORDER
HOOPA VALLEY TRIBE; THE HOOPA VALLEY TRIBAL COUNCIL; THE TRIBAL COURT OF THE HOOPA VALLEY TRIBAL RESERVATION; BYRON NELSON, Jr., HONORABLE JUDGE OF THE HOOPA VALLEY TRIBAL COURT; MERV GEORGE, CHAIRMAN OF THE HOOPA VALLEY TRIBAL COUNCIL,	)
Defendants-Appellees.	)

BEFORE: SCHROEDER, Chief Judge.

Upon the vote of a majority of nonrecused regular active judges of this court,[1] it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The three-

[1] Judge Fisher was recused.

judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.

Appendix C–1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERTA BUGENIG, *Plaintiff-Appellant,*	)	
	)	No. 99-15654
v.	)	
	)	D.C. No.
HOOPA VALLEY TRIBE; THE HOOPA VALLEY TRIBAL COUNCIL; THE TRIBAL COURT OF THE HOOPA VALLEY TRIBAL RESERVATION; BYRON NELSON, Jr., HONORABLE JUDGE OF THE HOOPA VALLEY TRIBAL COURT; MERV GEORGE, CHAIRMAN OF THE HOOPA VALLEY TRIBAL COUNCIL, *Defendants-Appellees.*	)	CV-98-03409-CW
	)	OPINION

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted
July 18, 2000—Seattle, Washington

Filed October 3, 2000

Appendix C–2

Before: Thomas H. Reavley,[1] Diarmuid F. O'Scannlain, and Ronald M. Gould, Circuit Judges.

Opinion by Judge O'Scannlain

SUMMARY

Government Law/Native Americans

The court of appeals reversed a judgment of the district court and remanded. The court held that an Indian tribe can not regulate timber harvesting on fee-patented private property within the reservation boundary.

The Hoopa-Yurok Settlement Act of 1988 (Settlement Act) resolved conflicts between the Hoopa and Yurok Indian tribes, partitioned an Indian reservation into two parts, one for each of these tribes, and "ratified and confirmed" existing governing documents of appellees the Hoopa Valley Indian Tribe (Tribe) and the Hoopa Valley Tribal Council (Tribal Council). The Tribal Council adopted a forest management/ timber harvest plan prohibiting all logging within a half-mile buffer zone around the sacred White Deerskin Dance Site and the trail leading to it. Appellant Roberta Bugenig, a nonmember of the Tribe and a non-Indian, shortly after establishment of the buffer zone, purchased in fee simple forty acres of land located within the Hoopa Valley Reservation and the buffer zone. The state of California issued Bugenig a logging permit for her land. The Tribe filed suit against Bugenig in the Hoopa Valley Tribal Court (Tribal Court) seeking injunctive relief and damages resulting from her logging activities in

[1] The Honorable Thomas H. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

violation of the forest management plan. The state revoked her logging permit. The Tribal Court found that the Tribe had jurisdiction over Bugenig's land and permanently enjoined her from harvesting timber in the buffer zone. Bugenig sought declaratory and injunctive relief against the Tribe and various tribal defendants in federal district court.

The district court granted the Tribe's motion to dismiss Bugenig's action, finding that Congress conferred upon the Tribe the authority to regulate Bugenig's land in the Settlement Act, which "ratified and confirmed" tribal governing documents that asserted tribal jurisdiction over nonmembers.

[1] Nothing in the Settlement Act itself explicitly conferred upon the Tribe jurisdiction to regulate nonmembers. The legislative history contained no indication that Congress considered giving or intended to give the Tribe authority to exercise jurisdiction over fee-patented land owned by non-Indians such as Bugenig.

[2] Language in the Tribal Constitution, which was "ratified and confirmed" by the Settlement Act potentially, but not definitively, delegated this authority to the Tribe.

[3] There must be express authorization for an Indian tribe to exercise authority over nonmembers.

[4] There are few examples of congressional delegation of authority to tribes.

[5] Federal law expressly delegates power to Indian tribes to regulate the distribution of alcoholic beverages in "Indian country," defined as Indian reservation land, "notwithstanding the issuance of any patent." This recognized delegation language is conspicuously absent from the Settlement Act.

[6] Congress can make express delegations of power to Indian tribes to regulate the actions of nonmembers, but because of the presumption against tribal jurisdiction over

nonmembers, any such delegation must truly be express. If Congress uses the "notwithstanding the issuance of any patent" proviso, which is an easily invoked gold standard for delegation, then an appropriate delegation has been made. If a tribe claims that some other statutory language represents a conferral of jurisdiction, however, any such alternative language must, on its face, represent a pellucid delegation of the claimed authority.

[7] The provision of the Settlement Act relied upon by the Tribe for its authority to regulate timber harvesting on Bugenig's property, which contained no explicit authorization of jurisdiction, but simply incorporated by reference tribal documents that were themselves subject to varying interpretations, fell well short of the required standard.

[8] An Indian tribe may have the authority to regulate the conduct of nonmembers through either congressional delegation or inherent tribal authority.

[9] As a general proposition, the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. There are two narrow exceptions to this general rule: Tribes may exercise civil jurisdiction over nonmembers when (1) nonmembers enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements; or (2) nonmembers engage in conduct on fee lands within a tribal reservation that threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

[10] At issue in this case was whether the Tribe's exercise of regulatory jurisdiction over Bugenig's land through enforcement of the buffer zone could be upheld under the second exception, which is narrowly construed. This exception allows for tribal jurisdiction over nonmembers only to the

extent that such authority is necessary to protect self-government or control internal relations.

[11] The Tribe's regulation of Bugenig's use of her fee-owned land, even if justified by reference to some tribal interest, did not implicate tribal self-government or internal tribal relations. The exception did not apply.

COUNSEL

James S. Burling (argued), Pacific Legal Foundation, Sacramento, California, for the plaintiff-appellant.

Thomas P. Schlosser (argued), K. Allison McGaw, Morriset, Schlosser, Ayer & Jozwiak, Seattle, Washington, for the defendants-appellees.

Ethan G. Shenkman, Anne R. Traum, United States Department of Justice, Environment and Natural Resources Division, Washington, D.C.; Sandra J. Ashton, Office of the Solicitor, United States Department of the Interior, Washington, D.C., for amicus United States of America.

OPINION

O'SCANNLAIN, Circuit Judge:

This case presents questions of Indian law regarding the scope of tribal jurisdiction over the activities of nonmembers: specifically, to what extent can the tribe regulate land use of fee-patented private property within a reservation boundary?

Appendix C–6

I

In 1864, the Superintendent of Indian Affairs set aside the Hoopa Valley and its adjacent mountains, located in northwestern California, as the Hoopa Valley Indian Reservation. The boundaries of the original reservation, defined by statute in 1876, were subsequently extended by executive order in 1891. The expanded reservation was occupied jointly by the Hoopa Indians and a group of non-Hoopa Indians. This arrangement led to numerous disputes, and a great deal of litigation, over the proper allocation of political authority and reservation income (primarily from the sale of timber) between the two groups. *See Short v. United States*, 661 F.2d 150, 151-53 (Ct. Cl. 1981) (describing the history of the Hoopa Valley Indian Reservation and the disputes between the Hoopa and non-Hoopa Indians); *Puzz v. United States*, No. C80-2908-THE, 1988 WL 188462, at *1-2 (N.D. Cal. April 8, 1988) (same).

Congress attempted to resolve these conflicts through passage of the Hoopa-Yurok Settlement Act of 1988, 25 U.S.C. §§ 1300i-1300i-11 ("the Settlement Act"). The Settlement Act partitioned the expanded reservation into two parts: (1) the original reservation as defined in 1876, which was set aside as the Hoopa Valley Indian Reservation ("the Reservation"); and (2) the extension added in 1891, which was set aside as a reservation for a newly recognized tribe of non-Hoopa Indians called the Yurok Tribe. *See id.* § 1300i-1 (partitioning the expanded reservation); *id.* § 1300i-8 (recognizing the Yurok Tribe). The Settlement Act also provided that (1) "[t]he existing governing documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary [of the Interior], are hereby ratified and confirmed," *id.* § 1300i-7; and (2) the "status as an Indian tribe" of the newly recognized Yurok Tribe "is hereby ratified and confirmed," *id.* § 1300i-8(a)(1).

The Hoopa Valley Tribe ("the Tribe") is a federally-recognized Indian tribe. The Tribe is organized under a constitution and amendments approved by the Secretary of the Interior and is governed by the Hoopa Valley Tribal Council ("Tribal Council"), pursuant to the Hoopa Valley Tribal Constitution.

Every other summer, the Tribe holds its well-known White Deerskin Dance, a ten-day dance dedicated to "world renewal." The dance is a public event imbued with cultural, social, and religious significance for the Tribe. The dance, which is accompanied by feasting and celebration, takes place at the sacred White Deerskin Dance Site ("the Site") on Bald Hill, as well as at four other locations throughout the Reservation.

On January 28, 1995, after providing notice to affected land owners and holding public hearings, the Tribal Council adopted a forest management/timber harvest plan prohibiting all logging within a half-mile buffer zone around the Site and the trail leading to it. The Tribal Council justified its action by citing the need to preserve the integrity and sanctity of the Site. The establishment of the buffer zone was approved by the Bureau of Indian Affairs.

Roberta Bugenig is a nonmember of the Tribe and a non-Indian whose ancestors migrated to the Hoopa Valley area approximately 150 years ago. On March 22, 1995, shortly after establishment of the half-mile buffer zone around the Site, Bugenig purchased in fee simple forty acres of land located within the Reservation's external boundaries and the buffer zone. Non-Indians such as Bugenig own less than three percent of the land within reservation boundaries.

Bugenig sought to harvest some second-growth timber on less than three acres of her forty-acre parcel in order to help pay for the construction of her retirement residence. On June 19, 1995, Bugenig applied to the State of California ("the State")

for a logging permit to harvest trees selectively on her land. Also on June 19, Bugenig appeared before the Tribal Council to request a hauling permit to transport harvested timber on a tribal road running over reservation land. The Tribal Council denied her request for a hauling permit.

After receiving a logging permit from the State in early July 1995, Bugenig sent a check for $140 to the Tribal Council on July 24, 1995, as intended payment for a hauling permit. On July 26, Bugenig began cutting down and harvesting trees on her land. On July 28, the Tribal Council returned Bugenig's check and ordered her to cease and desist from logging inside the buffer zone.

On August 3, 1995, the Tribe filed suit against Bugenig in the Hoopa Valley Tribal Court ("Tribal Court"), seeking injunctive relief and damages resulting from her logging activities in violation of the forest management plan. The Tribal Court issued a temporary restraining order that same day, followed a week later by a preliminary injunction barring Bugenig from harvesting timber on her land. On October 10, 1995, the State revoked Bugenig's logging permit, explaining that "no timber operations are allowed on significant historical or archeological sites [defined as] sites that have significant or religious importance to California Indians."

On July 11, 1996, the Tribal Court held that the Tribe has jurisdiction over Bugenig's land, and it permanently enjoined her from harvesting timber in the buffer zone. The Tribal Court also ordered Bugenig to clean her property, to cooperate with the Hoopa Valley Tribal Forestry Department in developing a reforestation plan, and to pay the Tribe's costs. Bugenig was

subsequently found in contempt for failing to comply with the Tribal Court's order.[2]

Bugenig appealed the Tribal Court's decision to the Northwest Regional Tribal Supreme Court ("Tribal Supreme Court"). On April 23, 1998, the Tribal Supreme Court affirmed the Tribal Court's holding that the Tribe has jurisdiction over Bugenig's activities and her land. The Tribal Supreme Court based its decision on (1) the second exception to the main rule of *Montana v. United States*, 450 U.S. 544 (1981);[3] and (2) the Settlement Act.

On September 4, 1998, having exhausted her remedies within the tribal court system, Bugenig filed suit in federal court against the Tribe and various tribal defendants. Bugenig sought declaratory and injunctive relief against the Tribe's exercise of regulatory jurisdiction over her land use and the tribal courts' exercise of adjudicatory jurisdiction over her disputes with the

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[2] The Tribal Court's injunction remains in effect, and a lien has been placed on Bugenig's property for the collection of the Tribal Court's $100 fine for contempt. The State's revocation of Bugenig's logging permit does not render this case moot, because it is possible that Bugenig will apply for a new logging permit and begin to harvest timber on her property if the injunction is lifted. *See Allee v. Medrano*, 416 U.S. 802, 810 (1974).

[3] As discussed *infra*, the first *Montana* exception permits certain tribal regulation of "the activities of nonmembers who enter consensual relationships with the tribe or its members," while the second exception authorizes tribal jurisdiction over nonmember conduct when such conduct "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." 450 U.S. at 565-66. The Tribal Supreme Court reversed a portion of the Tribal Court's decision finding the first *Montana* exception applicable and affirmed as to the applicability of the second exception.

Tribe. The Tribe filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

The district court granted the Tribe's motion to dismiss. The district court held that through passage of the Settlement Act, which "ratified and confirmed" tribal governing documents that assert tribal jurisdiction over nonmembers, Congress conferred upon the Tribe the authority to regulate Bugenig's land. Because it found express congressional authorization for the Tribe's exercise of jurisdiction, the district court did not reach the issue decided by the tribal courts regarding the Tribe's claim of inherent authority to regulate under the second *Montana* exception.

Bugenig filed this timely appeal.[4]

II

We begin by addressing whether the relevant section of the Settlement Act relied upon by the Tribe and the district court constitutes an "express authorization by federal statute or treaty [of] tribal jurisdiction over the conduct of nonmembers." *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997).

A

The statutory provision at issue provides, in full, as follows: "The existing governing documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed." 25 U.S.C. § 1300i-7.

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[4] The United States, which did not participate in the district court proceedings, submitted an amicus curiae brief urging affirmance based on inherent tribal authority pursuant to the second *Montana* exception. The motion of the United States for an extension of time to file an amicus brief, construed as a motion for leave to file an untimely amicus brief, is granted.

[1] The fact that nothing in the Settlement Act itself explicitly confers upon the Tribe jurisdiction to regulate nonmembers raises serious questions as to how carefully Congress considered whether it was making any grant of regulatory authority to the Tribe. Moreover, the Settlement Act uses the same "ratified and confirmed" language to recognize the newly created Yurok Tribe, 25 U.S.C. § 1300i-8, which suggests that this language may simply represent Congress's attempt to establish the Hoopa Valley Tribe and the Yurok Tribe as the governing authorities for their respective reservations, rather than a consciously made delegation of authority to the tribes to exercise jurisdiction over nonmembers. Indeed, legislative history makes clear that Congress's overriding concern in passing the Settlement Act was ending the acrimonious disputes between the Hoopa and non-Hoopa Indians living in the Hoopa Valley by creating two separate reservations, one for the Hoopa and one for the Yurok, in which each group would be free to govern itself without interference from the other. *See, e.g.*, 134 Cong. Rec. S13967-02, 1988 WL 177595, at *34 (Sept. 30, 1988) (statement of Sen. Inouye) (explaining the Hoopa Tribe's loss of its ability to govern the area that ultimately became its exclusive reservation); 134 Cong. Rec. H9406-01, 1988 WL 176807, at *35 (Oct. 3, 1988) (statement of Rep. Bosco) (explaining the Settlement Act as "lay[ing] the groundwork for strong, healthy tribal communities"). The legislative history contains no indication that Congress considered giving or intended to give the Tribe authority to exercise jurisdiction over fee-patented land owned by non-Indians such as Bugenig.

Despite this ambiguity with respect to the Settlement Act as a grant of power over tribal nonmembers, the district court interpreted § 1300i-7 as a congressional delegation of authority to the Tribe to exercise such jurisdiction. The district court reasoned that § 1300i-7's "ratified and confirmed" language works to "give[ ] every clause in the document being ratified

the full force and effect of a congressional statute." Turning to the Tribe's governing documents, the district court looked to Article III of the Tribal Constitution, which provides that the Tribe has jurisdiction over "all lands within the confines of the Hoopa Valley Indian Reservation boundaries as established by Executive Order of June 23, 1876, and to such other lands as may hereafter be acquired by or for the Hoopa Valley Indians." The district court held that "under the plain language of Article III, the Hoopa Valley Tribe has jurisdiction over Bugenig's land" as land located within the boundaries of the reservation.

There is, however, a competing plausible interpretation of the Tribal Constitution. Bugenig, relying upon language in the Tribal Constitution asserting tribal jurisdiction over "such other lands as may hereafter be acquired by or for the Hoopa Valley Indians," argues that "other lands" should be read as referring only to "fee lands not presently owned by the tribe—land outside the reservation boundaries and land such as Mrs. Bugenig's fee property." In other words, the district court's and Tribe's broad reading of "all lands" within reservation boundaries would render superfluous the reference to "such other lands as may hereafter be acquired by or for the Hoopa Valley Indians." Bugenig's interpretation also appears viable.

The district court additionally relied upon Article IX of the Tribal Constitution. This provision provides that the Tribal Council, "subject to any limitations imposed by Federal statutes or by the Constitution of the United States," shall have the power "[t]o safeguard and promote the peace, safety, morals, and general welfare of the Hoopa Valley Indians by regulating the conduct of trade and the use and disposition of property upon the reservation, provided that any ordinance directly affecting non-members of the Hoopa Valley Tribe shall be subject to the approval of the Commissioner of Indian Affairs or his authorized representative." The wording of this provision, which links "conduct of trade" with the "use and

disposition of property," suggests that it merely represents the Tribe claiming for itself the power to regulate consensual commercial dealings between tribal members and nonmembers under the first exception to *Montana's* main rule. The district court, however, simply accepted the tribal courts' interpretation of this language as a jurisdictional grant, based on a tribal court's power to determine the purpose, scope, and operative effect of its own constitution.

It is worth noting that nothing in Article IX affirmatively grants or expressly claims tribal authority to regulate nonmember activity; rather, in recognizing the possibility of a tribal ordinance "directly affecting" nonmembers, the provision is at best an implicit grant of power. Furthermore, as Bugenig points out, the provision could also be easily viewed as "refer[ring] to in personam jurisdiction over non-Indians within the reservation, an interpretation that would be consistent with the presumption against tribal regulatory jurisdiction over non-Indian fee lands." *Cf. County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 264-65 (1992) (contrasting in rein jurisdiction over fee-patented land within reservation boundaries with in personam jurisdiction over nonmembers on the reservation). In short, to the extent that Articles III and IX are not free of ambiguity, the Tribal Constitution's status as a grant of authority to the Tribe is less than perfectly clear.

B

[2] As the foregoing discussion indicates, there are plausible arguments on both sides as to whether the Settlement Act confers upon the Tribe the jurisdiction to regulate the activities of nonmembers. There is a reasonable case to be made for finding congressional authorization of tribal jurisdiction, but the case is by no means airtight. There is before us language that potentially, but not definitively, carries out a delegation of authority. We are thus confronted with the

following question: What standard should be employed for evaluating the sufficiency of a claimed delegation of congressional authority to a tribe to regulate the activities of nonmembers?

[3] *Strate* requires "express authorization" for an Indian tribe to exercise authority over nonmembers, 520 U.S. at 445; we have not yet had the occasion to address in detail how "express" this delegation must be. In *Burlington Northern Railroad Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999), *cert. denied sub nom. Estates of Red Wolf & Bull Tail v. Burlington Northern Railroad Co.*, 120 S. Ct. 1964 (2000), we touched upon the question, but only briefly. In *Red Wolf*, the estates of two Indians killed in an accident between a train and an automobile on a right-of-way granted by Congress to a railroad claimed that a tribal court had civil jurisdiction over their wrongful death actions. The estates attempted to argue that two statutes delegated to the tribe jurisdiction over the right-of-way: (1) the congressional grant of the right-of-way, which directs that the "operation of such railroad shall be conducted with due regard for the rights of the Indians"; and (2) the Indian Tribal Justice Support Act of 1993, which provides assistance for building tribal justice systems. *Id.* at 1064. We rejected these arguments for inferred grants of jurisdiction, holding simply that "[t]ribal jurisdiction over nonmembers on land subject to *Montana's* main rule requires express congressional authorization. Neither statute contains it." *Id.*

The above discussion from *Red Wolf* demonstrates that we are reluctant to find the requisite congressional authorization through implication from statutes that do not explicitly speak in terms of delegating authority.

[4] As for guidance from the Supreme Court and other courts, the relevant precedents are few, in part because "[t]here are few examples of congressional delegation of authority to tribes." Felix S. Cohen, *Handbook of Federal Indian Law* 253

(1982). In *United States v. Mazur*[illegible] 419 U.S. 544 (1975), the Supreme Court concluded that 18 [illegible]C. § 1161 constitutes a valid and express delegation to tribes of the authority to regulate the distribution of alcoholic beverages on reservations. In *Rice v. Rehner*, 463 U.S. 713 (1983), the Supreme Court reaffirmed this view of § 1161. That these are the only two cases in which the Supreme Court has squarely confronted and expressly found congressional delegation of authority to tribes suggests the extraordinary nature of such grants of power.

[5] In *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 433 (1989) (White, J.) (plurality opinion), Justice White cited the following examples of express statutory delegations of power to Indian tribes: 18 U.S.C. § 1151, 18 U.S.C. § 1161, and 33 U.S.C. § 1377(e), (h)(1). The specific language of these provisions merits careful consideration. Section 1161 gives tribes power to make laws regarding liquor sales in "Indian country," which is defined as including "all land within the limits of any Indian reservation under the jurisdiction of the United States government, *notwithstanding the issuance of any patent*, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151 (emphasis added). Section 1377(e) allows tribes to be treated as states under the Clean Water Act in setting water standards for federal Indian reservations, with the term "federal Indian reservation" defined as "all land within the limits of any Indian reservation under the jurisdiction of the United States government, *notwithstanding the issuance of any patent*, and including rights-of-way running through the reservation." 33 U.S.C. § 1377(h) (emphasis added). It is worth noting, then, that the delegations of congressional authority to Indian tribes that have been recognized by the Supreme Court all employ the same standard language to achieve delegation, giving Indian tribes authority over all land within the geographical boundaries of the reservation, "notwithstanding the issuance of any patent."

This recognized delegation language is conspicuously absent from the Settlement Act section relied upon by the Tribe.

In terms of evaluating the significance of this omission, we find highly persuasive the treatment of a similar omission in statutory language in *Arizona Public Service Co. v. EPA*, 211 F.3d 1280, 1300 (D.C. Cir. 2000) (Ginsburg, J., concurring in part and dissenting in part). In *Arizona Public Service*, the D.C. Circuit was called upon to determine whether 42 U.S.C. § 7601(d)(2)(B), a provision of the Clean Air Act, delegates to Indian tribes the authority to enforce the Clean Air Act on nonmember fee-owned land within a reservation. A majority of the court upheld the provision as a delegation based on its review of specific language in the statute that it found to establish an express delegation, *see* 211 F.3d at 1287-92; Judge Ginsburg dissented in part.

In his thorough and well-reasoned opinion, Judge Ginsburg expressed the view that § 7601(d)(2)(B) contains no express delegation of authority to tribes. He began by noting the general rule that because "an Indian tribe lacks inherent authority to regulate the conduct of a nonmember on land he owns within the boundaries of the tribe's reservation," a tribe may exercise such authority only by "*express* congressional delegation." *Id.* at 1300 (quoting *Montana*, 450 U.S. at 564) (emphasis added). Turning to the language of § 7601(d)(2)(B), he found it insufficient to establish such a delegation, in large part because of its failure to employ the "notwithstanding the issuance of any patent" language that "has been a feature in the only two cases in which the Supreme Court has found an express delegation of authority to tribes," namely, *Mazurie* and *Rice*, 211 F.3d at 1301-02. He offered the following analysis:

> One important indication that the Congress did not intend this phrase as an express delegation is that it used the Court tested "notwithstanding" provision in [42 U.S.C. § 7410(o)] but not in

> [§ 7601(d)(2)(B)]. . . . . I do not believe that the Congress, obviously aware that it could enlarge tribal authority over nonmember lands only through an express delegation, would include the formulaic "notwithstanding" proviso—the gold standard for such delegations—in the narrower of the two sections, and then use an obscure and never-before-attempted formulation to accomplish the same result in the broader of the two sections.

Id. at 1302-03. The above reasoning applies to the instant case. Not only does the Settlement Act fail to include the "gold standard" of delegation in the form of the "notwithstanding" proviso, but the provision relied upon by the Tribe, unlike § 7601(d)(2)(B), does not even reflect on its face any congressional consideration of the proper scope of tribal authority. If § 7601(d)(2)(B) is accurately described as an "obscure and never-before-attempted formulation" for delegation, § 1300i-7's ratification and confirmation of tribal documents is obscurer still.

[6] Supreme Court precedent establishes the existence of a presumption against tribal jurisdiction over nonmembers: "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without *express* congressional delegation." *Montana*, 450 U.S. at 544 (emphasis added). As *Montana* and *Strate* make clear, tribal jurisdiction over nonmembers is highly disfavored in light of the tribes' "diminished status as sovereigns." *Id.* at 565. In light of this presumption against such extraordinary grants of power, we believe it appropriate to adopt in this context a "clear statement rule": Congress can make express delegations of power to Indian tribes to regulate the actions of nonmembers, but because of the presumption against tribal jurisdiction over nonmembers, any such delegation must truly be "express." If Congress uses the

"notwithstanding proviso," which is an easily invoked, Court-approved "gold standard" for delegation, then an appropriate delegation has been made. If a tribe claims that some other statutory language represents a conferral of jurisdiction, however, any such alternative language must, on its face, represent a pellucid delegation of the claimed authority.

[7] Although the district court properly recognized that a statute's plain meaning is the starting and ending point for analysis in cases of statutory construction, its approach to interpreting the Settlement Act found plain meaning where none was to be found. The district court should have reviewed the claimed grant of congressional authority in light of the well-established background norms against which congressional delegations of authority to Indian tribes must be evaluated. These norms dictate that, when a tribe claims that Congress has delegated to it the authority to exercise jurisdiction over nonmembers, the claimed statutory delegation is subject to a clear statement rule. The provision of the Hoopa-Yurok Settlement Act relied upon by the Tribe—which contains no explicit authorization of jurisdiction, but simply incorporates by reference tribal documents that are themselves subject to varying interpretations—falls well short of the required standard.[5]

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[5] Much of Bugenig's argument on appeal is devoted to her claim that Congress, even if it had sought to do so, lacked the constitutional authority to delegate regulatory power over her land to the Tribe; such authority, she contends, properly belongs to the State of California under principles of federalism. In light of our holding that Congress did not intend nor effectuate any delegation of power to the Tribe through its passage of the Settlement Act, we express no view on Bugenig's constitutional challenges. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although

(continued...)

III

[8] *Strate* and *Montana* make clear that an Indian tribe may have the authority to regulate the conduct of nonmembers through either congressional delegation or inherent tribal authority. Having found no express congressional authorization, we must next decide whether the Tribe has inherent authority to regulate Bugenig's land under the *Montana* analysis.

[9] In *Montana*, the Supreme Court set forth the "general proposition" that "the inherent sovereign powers of an Indian tribe *do not extend to the activities of nonmembers of the tribe*." 450 U.S. at 565 (emphasis added) (stating the "main rule" of *Montana*). Noting the tribes' "diminished status as sovereigns," *id.*, the *Montana* Court pointed to two narrow exceptions to its general rule. Tribes may exercise civil jurisdiction over nonmembers when (1) nonmembers "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"; or (2) nonmembers engage in conduct on fee lands within a tribal reservation that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66. Finding neither exception applicable, the *Montana* Court held that the Crow Tribe lacked the authority to regulate hunting and fishing by nonmembers on property located within Crow reservation boundaries but owned in fee simple by non-Indians.

[10] The issue in this case is whether the Tribe's exercise of regulatory jurisdiction over Bugenig's land through enforcement of the buffer zone can be upheld under the second

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[5] (...continued)
properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

Montana exception.[6] The Supreme Court, in *Strate*, explained the exception in the following terms:

> Read in isolation, the *Montana* rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: 'Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. . . . But [a tribe's inherent power does not reach] beyond what is necessary *to protect tribal self-government* or *to control internal relations*.' 450 U.S. at 564.

520 U.S. at 459 (emphases added). Following *Strate*, we have emphasized that "[a]lthough broadly framed, [the second *Montana*] exception is narrowly construed." *County of Lewis v. Allen*, 163 F.3d 509, 515 (9th Cir. 1998) (en banc). In our unanimous en banc decision in *Allen*, we held that the Nez Perce Tribal Court lacked jurisdiction over a lawsuit brought by a tribal member against Idaho county law enforcement officers for false arrest, other torts, and a civil rights violation. Rejecting the tribe's argument for the exception's applicability based on the tribal interest in the safety of its members, we explained that "[u]nder the tribe's analysis, the exception would swallow the rule because virtually every act that occurs on the reservation could be argued to have some political, economic, health or welfare ramification to the tribe. The exception was not meant to be read so broadly." *Id.* at 515. Rather, when read "in its proper context," the exception allows for tribal jurisdiction only to the extent that such authority "is necessary

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[6] The parties agree that *Montana*'s main rule controls if the second exception does not apply. The Tribal Supreme Court concluded that the first exception was inapplicable in light of the absence of any significant consensual relationship between Bugenig and the Tribe, and the Tribe does not challenge this holding.

to protect self-government or to control internal relations." *Id.* (quoting *Strate*, 520 U.S. at 459) (quoting *Montana*, 450 U.S. at 564)); *see also Montana Dep't of Transp. v. King*, 191 F.3d 1108, 1114 (9th Cir. 1999) (explaining that "[t]he exception applies when to hold otherwise would threaten 'the right of reservation Indians to make their own laws and be ruled by them.'" (quoting *Strate*, 520 U.S. at 459)).

[11] While Bugenig's logging of her land may well have some political, economic, or health or welfare implications for the Tribe, the dispositive inquiry is whether her logging threatens to "trench unduly on tribal self-government." *Strate*, 520 U.S. at 458. While we acknowledge the cultural, social, and religious importance of the White Deerskin Dance, we cannot conclude that Bugenig's proposed logging is the type of activity that triggers the second *Montana* exception. The exception authorizes a tribe to do such things as punish tribe members, regulate their domestic relations and promulgate rules regarding tribal membership or inheritance within the tribe. *See id.* at 459. These tasks are fundamentally different from a tribe's attempt to regulate a nonmember's use of her fee-owned land; regulating such land use, even when justified by reference to some tribal interest, simply does not implicate "tribal self-government" or "internal [tribal] relations" in the same direct way that the activities enumerated in *Strate* do. Under the Tribe's view of the exception, a tribe could effectively acquire general regulatory jurisdiction over nonmember land simply through asserting an interest in protecting various sites of claimed historical or cultural importance. The Tribe's interpretation of *Montana* would permit the exception to "swallow the rule"—the very outcome that we warned against in *Allen*. 163 F.3d at 515.

Our conclusion that the second *Montana* exception does not give the Tribe jurisdiction over Bugenig's land is strongly reinforced by our decision in *Yellowstone County v. Pease*, 96 F.3d 1169 (9th Cir. 1996). In *Pease*, a member of the Crow

Tribe invoked the second Montana exception to defend the jurisdiction of the Crow Tribal Court (which had ruled that he was not required to pay property taxes imposed by Yellowstone County). *See id.* at 1176-77. We were unpersuaded:

> [W]e reject Pease's argument that the Tribe has jurisdiction under the second *Montana* exception. Although he concedes that this action directly concerns *only his particular property*, he argues that the overall impact of the loss of land due to potential foreclosures could be devastating to the Tribe's land holdings and political integrity. This contention fails to establish a "direct effect on the political integrity, the economic security, or the health or welfare of the Tribe as a whole." As the Supreme Court has stated, "[t]he impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe."

Id. at 1176-77 (emphasis added and citations omitted). What *Pease* makes clear is that when determining the applicability of the *Montana* exceptions, we will not conduct an aggregation analysis.[7] *See id.*; *see also Red Wolf*, 196 F.3d at 1065 ("We do not doubt the truth of John Donne's observation that '[n]o man is an island.' . . . However, the Supreme Court has declined to employ this logic in conjunction with the second *Montana* exception."). Instead, we focus our attention upon the actual impact of the individual activity over which a tribe seeks to exercise jurisdiction.

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[7] Perhaps the most well-known example of aggregation analysis can be found in the Supreme Court's interpretation of the Commerce Clause in *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942) ("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.").

As was the case in *Pease*, the litigation between Bugenig and the Tribe "concerns only [her] particular property." 96 F.3d at 1176. Accordingly, we do not consider "the overall impact of the loss of [forested] land due to potential [logging]," *id.*, but look only to the effect that Bugenig's logging of *her own* particular parcel might have upon the Tribe's political integrity. Under this analysis, we cannot say that Bugenig's logging fundamentally threatens the Tribe's ability to govern itself in any way. We are confident enough in the governmental strength of the Tribe to conclude that its political integrity would not be "imperil[ed]," as required under *Pease*, by a selective timber harvest on a parcel of less than three acres.

Furthermore, our precedents have stressed the inapplicability of the second *Montana* exception in situations where tribal jurisdiction "is not necessary to protect Indian tribes or their members who may pursue their causes of action in state or federal court." *Allen*, 163 F.3d at 516. This reasoning also applies here. California state law provides protections for certain Native American tribal resources. *See, e.g.*, Cal. Pub. Res. Code § 5097.9 (prohibiting state agencies from "caus[ing] severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, except on a clear and convincing showing that the public interest and necessity so require"). The Tribe's success in obtaining relief from the State of California, in the form of the revocation of Bugenig's logging permit, demonstrates that "[t]he absence of tribal jurisdiction does not leave the Tribe or its members without redress for nonmembers' alleged wrongs." *Red Wolf*, 196 F.3d at 1065.

Any lingering doubts as to the inapplicability of the second *Montana* exception are dispelled when the instant ease is measured against our most recent application of the exception. In *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998), we upheld against facial challenge regulations of the

Environmental Protection Agency allowing a qualifying Indian tribe to be treated as a state for purposes of promulgating water quality standards under the Clean Water Act. *See id.* at 1138. We did so in large part based upon precedent "recogniz[ing] that threats to water rights may invoke inherent tribal authority over non-Indians" due to the tangible and direct impact that such threats pose to tribal health and welfare. *Id.* at 1141.

This case is quite different. Simply stated, any arguable impact that cutting second-growth timber might have upon the holding of a tribal dance once every two years, at a site some distance away, "has no potential to affect the health and welfare of a tribe in any way approaching the threat inherent in impairment of the quality of the [tribe's] principal water source." *Id.* Returning to *Montana*'s emphasis upon political integrity, to the extent that a government is legitimately charged with providing certain basic services to its citizens, it is difficult to imagine how serious threats to water quality could not have profound implications for tribal self-government. The same cannot be said of the situation here.

Finally, our recent decision in *Nevada v. Hicks*, 196 F.3d 1020 (9th Cir. 1999), confirms the correctness of our conclusion as to the inapplicability of the second *Montana* exception. In holding that a tribal court had jurisdiction over state officials for tribal common law torts and certain federal and tribal civil rights claims, we emphasized that "the incidents underlying the instant case occurred on Indian-owned, Indian-controlled land, over which the Tribe retained its right to exclude non-members."[8] *Id.* at 1027. Surveying the relevant

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[8] A tribe's "virtually absolute power to exclude" was crucial to the analysis of the separate opinion of Justice Stevens in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 433 (1989) (opinion of Stevens, J., joined by O'Connor, J.) ("[P]roper resolution of these cases depends on the extent to which

(continued...)

precedents of the Supreme Court and this court, we noted the strong connection between tribal power and the ownership and control of land. *See id.* at 1025-27. Because of this relationship, an Indian tribe's claim of jurisdiction is significantly strengthened when the events at issue took place on land owned and controlled exclusively by tribal members.

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[8] (...continued)
the Tribe's virtually absolute power to exclude has been either diminished by federal statute or voluntarily surrendered by the Tribe itself."). As we have previously explained, the views expressed in Justice Stevens's opinion deserve careful consideration because Justice Stevens and Justice O'Connor were the deciding votes in *Brendale*. *See Hicks*, 196 F.3d at 1028 n.9.

Unlike *Brendale*, this case involves no allegation of a non-total exclusionary power on the part of the tribe seeking to exercise jurisdiction. Thus, the holding of *Brendale* with respect to the Yakima Indian Nation's power to zone nonmember fee land located within the so-called "closed" area of the reservation simply does not apply here. Although the Tribe attempts to discount the significance of the Yakima Nation's right to exclude in *Brendale*, the controlling opinion of Justice Stevens makes its importance quite clear. *See* 492 U.S. at 437 (describing the difference between the "closed area" and the "open area" as one of "critical importance").

The Tribe stresses that the closed area in *Brendale*, like the area at issue in this case, was almost entirely owned by tribal members. Under *Brendale*, however, a high percentage of tribal ownership in an area is not enough by itself to trigger tribal jurisdiction. It is also necessary to make some showing that a tribe has reserved its right to exclude, since this power was precisely what gave the Yakima Nation "the lesser [included] power to regulate land use in the interest of protecting the tribal community." *Id.* at 433.

Finally, it is important to note the fragmentation of the *Brendale* Court. In light of the Court's inability to settle upon a clear holding in *Brendale*, it is not surprising that *Montana* and *Strate*, which speak in clear terms and with a unified voice, have been far more influential in shaping the law of tribal jurisdiction in the lower courts.

Conversely, when a tribe attempts to assert regulatory authority over land that is owned and controlled by a nonmember, it confronts a nearly impossible task. This is because, under *Strate*, "tribes lack authority to regulate, and thus power to adjudicate, activities on land alienated to non-Indians." *Id.* at 1027; *see also Red Wolf*, 196 F.3d at 1064 (citing *Strate* for the proposition that "[t]ribal jurisdiction over nonmembers on land subject to *Montana*'s main rule requires express congressional authorization").

The main rule of *Montana* controls this case. Under *Montana*, *Strate*, and our cases construing those two foundational precedents, we are precluded from relying upon *Montana's* exceedingly narrow second exception to find tribal jurisdiction over a nonmember's use of her fee-owned land.

IV

In *Strate*, the Supreme Court set forth the following rule: "absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." 520 U.S. at 445. This language means just what it says: the congressional authorization must be "express," not inferred or implied, and the circumstances under which a tribe can exercise authority over nonmember conduct on nonmember-owned land are "limited" indeed.

For the foregoing reasons, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

Appendix D–1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED: March 31, 1999

ROBERTA BUGENIG,	)
	) No. C 98-3409 CW
Plaintiff,	)
	)
v.	)
	) AMENDED ORDER
HOOPA VALLEY TRIBE;	) GRANTING
THE HOOPA VALLEY	) DEFENDANT'S
TRIBAL COUNCIL; THE	) MOTION TO DISMISS
TRIBAL COURT OF THE	) AND DENYING
HOOPA VALLEY	) PLAINTIFF'S MOTION
RESERVATION;	) TO STRIKE
HONORABLE BYRON	)
NELSON, JR., Judge of the	)
Hoopa Valley Tribal Court; and	)
MERV GEORGE, Chairman of	)
the Hoopa Valley Tribal	)
Council,	)
	)
Defendants.	)
	)

The Court hereby amends this Order as follows: the date on page 4, line 17 is changed from September 4, 1996 to September 4, 1998.

AMENDED ORDER

Plaintiff Roberta Bugenig brings an action under 28 U.S.C. § 1331 to determine whether Defendants have exceeded

the limits of their jurisdiction. Defendant Hoopa Valley Tribe[1] moves to dismiss this action on the ground that the Northwest Regional Tribal Supreme Court (Tribal Supreme Court) correctly found that it had jurisdiction to decide Plaintiff's challenge to the Hoopa Valley Tribe's authority to regulate logging on her land which is located within the Hoopa Valley Reservation. Plaintiff opposes the motion and moves to strike Defendant's proposed undisputed facts. The matter was heard on January 29, 1999. Having considered all of the papers filed by the parties and oral argument on the motion, the Court GRANTS Defendant's motion to dismiss and DENIES Plaintiff's motion to strike.

BACKGROUND

In 1864, the Superintendent of Indian Affairs set aside the Hoopa Valley and its adjacent mountains, including Bald Hill, as the Hoopa Valley Indian Reservation. President Ulysses S. Grant defined the reservation's boundaries by executive order in 1876. In 1891, President Benjamin Harrison extended the reservation's boundaries by executive order. Congress subsequently partitioned the reservation and returned it to its original size by the Hoopa-Yurok Settlement Act of 1988, 25 U.S.C. §§ 1300i-1300i-11.

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[1] The Hoopa Valley Tribe is the only Defendant moving to dismiss Plaintiff's complaint. A district court may dismiss *sua sponte* an action as to defendants who have not moved to dismiss where such defendants are in a position similar to that of the moving defendant or where the claims against such defendants are integrally related. *See Silverton v. Department of Treasury*, 644 F.2d 1341, 1345 (9th Cir.), *cert. denied*, 454 U.S. 895 (1981). Here, all Defendants are in the same position as the moving Defendant, and therefore, the Court dismisses *sua sponte* Plaintiff's claims as to all Defendants.

The Hoopa Valley Tribe is a federally recognized Indian Tribe, organized under a constitution and amendments approved by the Secretary of the Interior on November 20, 1933, September 4, 1952, August 9, 1963, and August 18, 1972. The Hoopa Valley Tribal Council (Tribal Council) is the governing body of the Hoopa Valley Tribe under Article V of the 1972 Hoopa Valley Tribal Constitution (Tribal Constitution).

On January 28, 1995, the Tribal Council adopted a timber harvest plan that established a one-half mile buffer zone around the sacred White Deerskin Dance Site on Bald Hill and the trail leading thereto. The harvest plan prohibited any logging within the buffer zone.

On March 22, 1995, Bugenig, who is not an Indian and not a member of the Hoopa Valley Tribe, purchased forty acres of land in fee simple title from the Gould Family Partnership. On June 1, 1995, Bugenig recorded her deed in Humboldt County, California. The land, located near where Bugenig's family has lived for nearly 150 years, is within the external boundaries of the reservation and the White Deerskin Dance Site's one-half mile buffer zone.

On June 19, 1995, Bugenig applied to the State of California for a logging permit to harvest trees selectively on less than three acres of her land. On July 24, 1995, after receiving the State permit, Bugenig sent a personal check in the amount of $140 to the Tribal Council for a hauling permit to transport the harvested timber on a tribal road. Two days later, Bugenig began harvesting trees on her land. On July 28, 1995, the Tribal Council returned the personal check and ordered Bugenig to cease and desist her logging activity, citing the one-half mile buffer zone prohibition on logging.

On August 3, 1995, the Hoopa Valley Tribe filed an action against Bugenig in the Hoopa Valley Tribal Court (Tribal Court) for injunctive relief and damages resulting from the timber harvest on her land in contravention of the Hoopa Valley Tribe's one-half mile buffer zone prohibition on logging. Bugenig responded to the complaint by asserting that the Tribal Court lacked jurisdiction over her fee land. On August 10, 1995, the Tribal Court issued a preliminary injunction barring Bugenig from harvesting timber on her land. On October 17, 1995, the State of California Department of Forestry and Fire Protection revoked Bugenig's logging permit.

On July 11, 1996, the Tribal Court permanently enjoined Bugenig from harvesting timber in the one-half mile buffer zone. On July 19, 1996, Bugenig appealed the Tribal Court's decision to the Tribal Supreme Court. On appeal, Bugenig challenged the Tribal Court's conclusion that the Hoopa Valley Tribe had jurisdiction over Bugenig's activities on her fee land.

On April 23, 1998, the Tribal Supreme Court affirmed the Tribal Court's decision upholding the Tribal Council's authority to regulate logging activities on fee lands located within the reservation's boundaries. On September 4, 1998, Bugenig filed this action seeking declaratory adjudication that the Hoopa Valley Tribe does not have regulatory jurisdiction over her land and that the Tribal Court does not have subject matter jurisdiction over it. Bugenig also seeks an injunction enjoining these bodies from asserting such jurisdiction over her land.

LEGAL STANDARD

A motion to dismiss for failure to state a claim will be denied unless it appears that the plaintiff can prove no set of facts which would entitle her to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Fidelity Fin. Corp. v. Federal Home Loan Bank of San Francisco*, 792 F.2d 1432, 1435 (9th Cir. 1986). All material allegations in the complaint

will be taken as true and construed in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). Dismissal of a complaint can be based on either the lack of a cognizable legal theory or the lack of sufficient facts alleged under a cognizable legal theory. *See Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

A tribal court decision regarding tribal jurisdiction will be overturned if its determination of factual questions is clearly erroneous. *See FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990). Review of federal legal questions in a tribal court's decision about tribal jurisdiction is *de novo*. *See id.*

DISCUSSION

I. MOTION TO DISMISS

A. Federal Question Jurisdiction

Federal courts have subject matter jurisdiction to determine whether a tribal court has exceeded the limits of its jurisdiction. *See Strate v. A-1 Contractors*, 520 U.S. 438, __, 117 S. Ct. 1404, 1411 (1997) (citing *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852-53 (1985)). "The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331." *National Farmers*, 471 U.S. at 852. Plaintiff alleges on the face of her complaint, among other things, that the Tribal Court lacks jurisdiction over her fee land located within the external boundaries of the tribal reservation. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1331.

B. Congressional Grant of Tribal Jurisdiction

It is well-established that Congress may expressly authorize tribal jurisdiction over the conduct of non-members within reservation boundaries. *See Strate*, 117 S. Ct. at 1409; *see also Montana v. United States*, 450 U.S. 544, 564 (1981). Absent express congressional authorization, however, the general rule is that Indian tribes lack jurisdiction over the conduct of non-members on non-Indian fee land located within a reservation. *See id.*

In support of its motion to dismiss, the Hoopa Valley Tribe argues that Congress expressly granted the tribe jurisdiction over all lands within the reservation's boundaries, including Bugenig's land, in the Hoopa-Yurok Settlement Act of 1988 (the Act). *See* 25 U.S.C. §§ 1300i-1300i-11. Section 1300i-7 of the Act states: "The existing governing documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed." 25 U.S.C. § 1300i-7. The "governing documents" referred to in § 1300i-7 include the Tribal Constitution. Article III of the Tribal Constitution states: "The jurisdiction of the Hoopa Valley Tribe shall extend to all lands within the confines of the Hoopa Valley Indian Reservation boundaries as established by Executive Order of June 23, 1876, and to such other lands as may hereafter be acquired by or for the Hoopa Valley Indians." (Pl.'s Ex. 1 at 5). Article IX, section 1(l) of the Tribal Constitution grants the Tribal Council the authority to

> safeguard and promote the peace, safety, morals and general welfare of the Hoopa Valley Indians by regulating the conduct of trade and the use and disposition of property upon the reservation, provided that any ordinance directly affecting non-members of the Hoopa Valley Tribe shall be

> subject to the approval of the Commissioner of Indian Affairs or his authorized representative.

(Pl.'s Ex. 1 at 5).

Resolution of this motion depends upon the meaning of the phrase "ratified and confirmed" in § 1300i-7 of the Act. The Hoopa Valley Tribe asserts that "ratified and confirmed" signifies that Congress expressly granted the tribe all the authority that the Tribal Constitution delegates to the tribe. Therefore, under the Hoopa Valley Tribe's reasoning, because Article III and Article IX of the Tribal Constitution grant the tribe authority over non-members' fee lands, the tribe retains the authority to regulate Bugenig's land. Bugenig responds that when Congress enacted the Act, it never intended to grant the Hoopa Valley Tribe jurisdiction over non-members' fee land. The Tribal Supreme Court concluded that the plain language of the Act supported tribal jurisdiction over non-members' fee land.

The correct construction of the Act is a question of law. Therefore, this Court must review *de novo* the Tribal Supreme Court's decision that the plain language of the Act supports the Hoopa Valley Tribe's assertion of jurisdiction.

In interpreting an act of Congress, the starting point is the language of the act itself. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.* If the language in a statute is unambiguous, judicial inquiry is complete. *See Rubin v. United States*, 449 U.S. 424, 430 (1981).

As noted above, § 1300i-7 of the Act provides that the Tribal Constitution is "ratified and confirmed." The phrase "ratified and confirmed" is common statutory language that Congress employs when it enacts legislation regulating the

authority of Indian tribes. *See, e.g., United States v. Sioux Nation of Indians*, 448 U.S. 371, 383 n.14 (1980) (concluding that a congressional act that "ratified and confirmed" an agreement with the Sioux Nation had the effect of implementing the terms of the agreement and abrogating an earlier treaty). Bugenig does not provide any authority supporting her contention that the phrase "ratified and confirmed" is ambiguous. The Court concludes that the plain meaning of "ratified and confirmed" is to give every clause in the document being ratified the full force and effect of a congressional statute. Nothing in the legislative history of the Act evinces a clearly expressed legislative intention to the contrary. *See Partitioning Certain Reservation Lands Between the Hoopa Valley Tribe and the Yurok Indians, To Clarify the Use of Tribal Timber Proceeds, and for Other Purposes*, S. Rep. No. 100-564 (1988). Accordingly, the Court holds that § 1300i-7 of the Act unambiguously grants each clause of the Tribal Constitution the full force and effect of a congressional statute.

1. Tribal Constitution

The Hoopa Valley Tribe argues that Article III of the Tribal Constitution grants the Hoopa Valley Tribe jurisdiction over Bugenig's land. Bugenig responds that neither Congress nor the Hoopa Valley Tribe intended Article III to erase traditional jurisdictional limitations over non-members' fee land.

Article III provides, in pertinent part, that the Hoopa Valley Tribe has jurisdiction over "all lands within the confines of the Hoopa Valley Indian Reservation boundaries as established by Executive Order of June 23, 1876." (Pl.'s Ex. 1 at 5). The plain language of Article III explicitly extends tribal jurisdiction to "all lands" within the reservation's boundaries. Nothing in the Tribal Constitution limits the plain language of Article III. It is undisputed that Bugenig's land is within the

reservation boundary as it existed in 1876. Therefore, under the plain language of Article III, the Hoopa Valley Tribe has jurisdiction over Bugenig's land.

The Hoopa Valley Tribe also asserts that the Tribal Constitution grants the Tribal Council regulatory authority over Bugenig's land. The Hoopa Valley Tribe contends that Article IX, section 1(l) of the Tribal Constitution explicitly grants the Tribal Council authority to regulate non-members' fee land. Article IX, section 1(l) provides, in pertinent part, that "any ordinance directly affecting non-members of the Hoopa Valley Tribe shall be subject to the approval of the Commissioner of Indian Affairs or his authorized representative." (Pl.'s Ex. 1 at 5). In determining the purpose, scope and operative effect of a tribal constitution, federal courts accept the interpretation of tribal courts. *See Tom v. Sutton*, 533 F.2d 1101, 1106 (9th Cir. 1976). Here, the Tribal Supreme Court has interpreted the Tribal Constitution as granting the Tribal Council regulatory authority over Bugenig's land. The Court, therefore, accepts the Tribal Supreme Court's interpretation of its own constitution.

Accordingly, the Court affirms the Tribal Supreme Court's decision that the Tribal Court has subject matter jurisdiction over Bugenig's land and that the Tribal Council has authority to regulate it.

II. MOTION TO STRIKE

Plaintiff moves to strike paragraphs 3.5, 3.6, 4.1, 4.2 and 6.6 of Defendant's proposed undisputed facts. Because the Court has not relied upon Defendant's proposed undisputed facts in its determination of Defendant's motion to dismiss, the Court denies Plaintiff's motion as moot.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss is GRANTED and Plaintiff's motion to strike is DENIED.

IT IS SO ORDERED.

Dated: MAR 31, 1999 /s/ Claudia Wilken
CLAUDIA WILKEN
UNITED STATES DISTRICT JUDGE

Copies mailed to counsel as
noted on the following page

Appendix E–1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED: March 8, 1999

ROBERTA BUGENIG,	)
	) No. C-98-3409 CW
Plaintiff,	)
	) JUDGMENT
v.	)
	)
HOOPA VALLEY TRIBE; THE HOOPA VALLEY TRIBAL COUNCIL; THE TRIBAL COURT OF THE HOOPA VALLEY RESERVATION; HONORABLE BYRON NELSON, JR., Judge of the Hoopa Valley Tribal Court; and MERV GEORGE, Chairman of the Hoopa Valley Tribal Council,	)
	)
Defendants.	)
	)

For the reasons as set forth in this Court's Order Granting Defendant's Motion to Dismiss and Denying Plaintiff's Motion to Strike filed March 4, 1999,

IT IS HEREBY ORDERED AND ADJUDGED:

That Plaintiff Roberta Bugenig take nothing, that the action be dismissed on the merits, and that Defendants recover of Plaintiff their costs of action.

Dated: March 8, 1999

/s/ Claudia Wilken
CLAUDIA WILKEN
United States District Judge

Appendix F–1

IN THE NORTHWEST REGIONAL TRIBAL SUPREME COURT

IN AND FOR

Hoopa Valley

Filed April 28, 1998

Roberta Bugenig, Appellant

v.

Hoopa Valley Tribe, Respondent

No. A-95-020

SUMMARY

Appeal of a final Decision and Order entered in the Hoopa Valley Tribal Court on July 11, 1996, against defendant Roberta Bugenig, appellant herein, and in favor of the Hoopa Valley Tribe. Appellant challenges the jurisdiction of the tribal court over fee lands located within the borders of the Hoopa Valley Indian Reservation.

FULL TEXT

Before: Elbridge Coochise, Chief Justice; Douglas W. Hutchinson, Justice; Thomas P. Keefe, Jr., Justice

Appearances: James S. Burling, Pacific Legal Foundation, for Appellant Roberta Bugenig; Thomas P. Schlosser, Morisset, Schlosser, Ayer & Jozwiak for Respondent Hoopa Valley Tribe.

Keefe, J.:

This matter came before the Hoopa Valley Court of Appeals on August 19,1997 on appeal of a Decision and Order of the Hoopa Valley Tribal Court (David L. Harding, Judge) entered on July 11, 1996. Appellant's timely appeal challenged the jurisdiction of the Hoopa Valley Tribal Court to assert

jurisdiction over activities that occur on the Appellant's fee land located within the exterior boundaries of the Hoopa Valley Indian Reservation. Appellant urged this court to review *de novo* the conclusion of law reached by the court below in its Decision and Order that tribal jurisdiction exists over all the territory within the Hoopa Valley Reservation, including fee land such as Appellant Bugenig's. Both parties provided extensive briefs in support of their respective positions, and counsel appeared on behalf of each to present oral arguments before this court.

SCOPE OF REVIEW

We agree that *de novo* review of the conclusions of law reached in this case is desirable, and perhaps even necessary, to a proper disposition of this matter. A full *de novo* review of the facts relied upon by the tribal court in reaching its conclusions of law, in the absence of clearly erroneous factual determinations, is deemed unnecessary. (see *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S. Ct. 1781 (1982). However, some reference to additional facts appearing in the record are necessary, partially occasioned by the fact that the Decision and Order entered in the court below provides no clear delineation between findings of fact and conclusions of law. Nevertheless, the pertinent underlying facts of this case upon which the court relied to reach its legal conclusion are clear.

BACKGROUND

This case presents an unfortunate collision between the interests of Appellant Roberta Bugenig, whose ancestors migrated to the area of the Hoopa Valley nearly 150 years ago, and the Hoopa Valley Indian Tribe who have occupied that region since before recorded time. At issue is a restriction in the tribe's ten year forest management plan that prohibits all logging activities within a one-half mile buffer zone adjoining the Hoopa Valley Tribe's sacred White Deerskin Dance Ground and the trail leading thereto.

Appellant purchased land within the restricted area within weeks after the Hoopa Valley Tribal Council action to establish the no logging zone. Her actions in logging a portion of her fee simple property, in apparent compliance with state authorization (later revoked) but in violation of tribal restrictions, brought Appellant Roberta Bugenig into conflict with the tribe. The Hoopa Valley Tribe takes the position that it has regulatory authority over all land located within the boundaries of the Hoopa Valley Indian Reservation. Appellant Bugenig asserts that as a non-tribal member owning a fee simple interest in land located on the reservation, her activities on her land are beyond the jurisdiction of the Hoopa Valley Tribal Court.

At an August 10, 1995 court hearing in which the Hoopa Valley Tribe sought and obtained an injunction against Roberta Bugenig from cutting trees within the one-half mile buffer surrounding the White Deerskin Dance Ground and trail, tribal elder Byron Nelson, Jr. testified:

> "The White Deerskin Dance is a world renewal dance. And the intent of the dance .... is to put everything back in balance that's gotten out of balance from dance to dance. And that's the main emphasis of the dance, is not only for the good of the Hoopa Tribe, but for all people."[1]

Mr. Nelson further stated:

"This dance site is the most important dance site of . . . all dances that the Tribe has, particularly the White Deerskin dance. The site is very ancient. There's scientific evidence that indicates it could be one of the oldest dance sites, oldest ceremonies in the country. The White Deerskin Dance is called

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[1] Testimony of Byron Nelson, Transcripts of Proceedings; August 10, 1995; P. 48.

Along the River Dance. As you can clearly see, this particular site isn't really along the river.

When I was doing research on the history book, I kept running across these legends that told when the river went out the other way, meaning going left as it left the valley instead of the right direction. It goes now easterly toward Weitchpec.

And so I had these geologists go out and study the area, and they found that the river did in fact go out to the left up through where Beaver Creek is now and come out in Martins Ferry in the Klamath River. And they stated that it was at least fifty thousand years ago that the river did go off this way.

So this dance and the trail could very well have gone along the river a long time ago. And the dance site was along the river at one time. So this site is very old . . . . This points to indicating that this is a very ancient site and it's been going on for thousands of years and it should be protected."[2]

The book referred to in Mr. Nelson's testimony, entitled OUR HOME FOREVER: The Hupa Indians of Northern California" (Nelson, Byron; Hupa Tribe, copyright 1978) contains an extended reference to the significance of the White Deerskin Dance to the Hupa people:

> "Beyond the coastal mountains of northwestern California, the Trinity River runs through a rich valley which has always been the center of the Hupa world, the place where the trails return. There, the legends say, the people came into being, and there they have always lived. From this central valley, Hupa land spread out in every direction. Starting at the junction of the Klamath and Trinity rivers, the boundary of Hupa territory ran west through the

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[2] *ibid*; page 52.

Bald Hills. It turned south along the divide between Pine and Redwood creeks, following the divide to the Grouse Creek area. There it headed east, crossing the Trinity at Cedar Flat. It ran north through the Trinity Alps, around Trinity Summit, and back to the river junction following a line west of Red Cap Creek. Within this land were fields of grass; groves of pine, madrone, and oak; streams which supported many fish, birds, and animals; and mountain forests of pine, yew, fir, and oak filled with wildlife. The Hupa used all of these resources, but they made their homes and villages beside the Trinity River, in the valley from which they took their name.

At the very heart of that valley was *Takimildin*. This village known as the "Place of the Acorn Feast" was the site of three Hupa ceremonies, the place from which the tribe's main spiritual leader was chosen, and the spiritual center for the people of the valley. For longer than any man could remember, the sacred house had stood there. For thousands of years, spiritual leaders and members of the tribe had come there to pray and meditate, and dancers had met outdside the big house on the night before the most sacred White Deerskin Dance to practice. From time to time, fire or flood destroyed the wooden walls of the big house, but the Hupa always rebuilt it on its original, sacred foundations.[3]

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[3] Nelson, Byron *OUR HOME FOREVER: The Hupa Indians of Northern California*; p 5.

. . ."Long before the White Deerskin Dance began in late August or early September, the people of *Takimildin* and *Medildin* began their preparations.

Throughout the year the men worked on the regalia the dancers would use. They stuffed the heads of unusually marked white deerskins which gave the dance its name. These carefully prepared, decorated deerskins were considered tribal property. The dancers held them in trust. Although a child could inherit dance regalia, no individual could buy or sell the skins. Because the White Deerskin Dance revolved around *Takimildin* and the sacred house, the spiritual leader of *Takimildin* began the preparations for the dance each year. Then each district set up three of the six camps which would be used during the ten-day dance. Women prepared baskets of salmon and acorn soup and venison for the feasts. Dancers checked their costumes and rehearsed their steps. Peacemakers worked to settle any unresolved feuds, since the dance could not begin as long as conflict, dissension, or bad feeling remained in the valley. Those who had called the dance had to make a payment to any family in which there had been a death during the year. Holding a dance without this settlement would have offered an insult to the family's grief. Only when all of these things had been done could the dance begin.

The dancers met at *Takimildin*, and all of the people went by canoes to *Xowunkut*, the first dance place. There the spiritual leaders prepared the dance grounds, the women organized the feast, and the dancers dressed and

painted themselves. When all was ready, dancers from one of the two districts took their places. At the center of the line stood the singer. He wore a headband of painted buckskin decorated with strips of wolf hair, and an open twine net which reached to his shoulders. On either side of him, the dancers who carried the deerskins formed a line. They wore headbands, but no nets. When the singer began, the dancers moved back and forth. Two dancers, who wore headdresses of sea lion tusks with closely twined nets which hung to their waists, carried red or black obsidian blades. Starting at opposite ends, they danced back and forth in front of the line of men holding the deerskins. When the dancers from the first district had completed a set, dancers from the other district took their places. The dance went on in this way through the afternoon.

After an evening of feasting and celebration, the people moved downriver to *Tsemeta*, just below the mouth of Hostler Creek, for the next dance. They danced, feasted, and played games there. Then came the Boat Dance. Dancing in four large dugout canoes, the dancers drifted downriver toward *Meskut*. Near the village the four canoes came toward the bank together and then backed out into the river. Ten times they paddled forward and back before they landed. Then the people went to the dance grounds for the Mock Dance. This dance received its name because the dancers performed it like the regular dance, but substituted funny or improper things for those usually done. They might, for example, carry

ordinary rocks in place of the rare obsidian blades. After dancing at *Meskut*, the people moved to *Tceindeqotdin* and *Tselundin* to repeat the dances and feasts. At *Tceindeqotdin* they enjoyed a day of rest, gambled and played games. Then they walked to the next dance site at the end of the valley beneath Bald Hill. For the last dances of the ceremony, they moved to *Noltukalai*, the place "among the oak tops" on Bald Hill. There, the legends say, the immortals watched the people of the valley dance with the precious white deerskins and the sacred obsidian blades."[4]

STATEMENT OF FACTS

On August 21, 1864, Austin Wiley, Superintendent of Indian Affairs for the State of California, acting under authority of the United States of America, issued an Executive Order stating, in part:

> *"I do hereby proclaim and make known to all concerned that I have this day located an Indian reservation to be known and called by the name and title of the Hoopa Valley Reservation, Cal., to be described by such metes and bounds as may hereafter be established by order of the Interior Department, subject to the approval of the President of the United States. Settlers in Hoopa Valley are hereby notified not to make any further improvements upon thier places, as they will be appraised and purchased as soon as the Interior Department may direct."*

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[4] *ibid*; p 32-33.

On June 23, 1876, President Ulysses S. Grant issued an Executive Order describing the reservation's bondaries encompassing a portion of lands adjoining the Trinity River the perimeter of which was

> "*declared to be the exterior boundaries of the Hoopa Valley Indian Reservation, and the land embraced therein, an area of 89,573.43 acres, be, and hereby is, withdrawn from public sale, and set apart for Indian purposes . . . .* "

The reservation was subsequently extended by Executive Order of President Benjamin Harrison in 1891, and later partitioned and returned to its original size by the Hoopa-Yurok Settlement Act of 1988 (Pub. L. 100-580, 102 Stat. 2929; 25 USC 1301i et. seq.). That law states in part:

> "*Effective with the partition of the joint reservation as provided in subsection (a) of this section, the area of land known as the "square" (defined as the Hoopa Valley Reservation established under section 2 of the Act of April 8, 1864 (13 Stat. 40), the Executive Order of June 23, 1876, and Executive Order 1480 of February 17, 1912) shall thereafter be recognized and established as the Hoopa Valley Reservation. The unallotted trust land and assets of the Hoopa Valley Reservation shall thereafter be held in trust by the United States for the benefit of the Hoopa Valley Tribe.*"

The act further states:

> "*The existing governing documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed.*"

The Hoopa Valley Tribe is organized under a constitution and amendments approved by the Secretary of the Interior on November 20, 1933, September 4, 1952, August 9, 1963, and August 18, 1972. A specific indication of Congressional intent in passing the Hoopa-Yurok Settlement Act can be found in the Senate Report accompanying the legislation which states:

> *"[P]laintiffs [in Puzz v. United States] challenged the right of the United States to recognize the governing body of the Hoopa Valley Tribe as the sole governing authority of the reservation entitled to manage the reservation resources . . . absent statutory delegations . . . This legislation will remove the legal impediments to the Hoopa Valley Indian tribe to governence of the Hoopa Square . . ."*

Article II of the Constitution and Bylaws of the Hoopa Valley Tribe states:

> **"The jurisdiction of the Hoopa Valley Tribe shall extend to all lands within the confines of the Hoopa Valley Indian Reservation boundaries as established by Executive Order of June 23, 1876, and to such other lands as may hereafter be acquired by or for the Hoopa Valley Indians."**

Article IX Powers and Duties of Tribal Council includes in Section 1 (f):

> **(1) To provide assessments or license fees upon non-members doing business or obtaining special privileges within the reservation, subject to the approval of the Commissioner of Indian Affairs or his authorized representative. (2) To**

> **promulgate and enforce assessments or license fees upon member exercising special privileges or profiting from the general resources of the reservation.**

Article IX, Section 1 (1) authorizes the governing Tribal Council:

> **"To safeguard and promote the peace, safety, morals, and general welfare of the Hoopa Valley Indians by regulating the conduct of trade and the use and disposition of property upon the reservation, provided that any ordinance directly affecting non-members of the Hoopa Valley Tribe shall be subject to the approval of the Commissioner of Indian Affairs or his authorized representative."**

The property involved in this dispute is located on the Hoopa Valley Indian Reservation in an area referred to as Bald Hill, and was originally allotted to members of the Hoopa Tribe under the General Allotment Act. One twenty acre portion held in trust for Mae Wallace Baker was subsequently converted to fee simple patent in 1947. Another parcel, held in trust for Robert Pratt, was sold out of trust status in 1958 to Don H. Gould. Both parcels later became the property of a California Limited Partnership called the Gould Family Partnership. The present day Hoopa Valley Indian Reservation, referred to as "the Hoopa Square", has less than one percent of its approximately ninety thousand acres held in fee simple status by non-Indians such as Appellant Bugenig.

In September 1994, the Hoopa Valley Tribe notified all land owners within that portion of the reservation known as Bald Hill of a proposal which would, among other things, establish a buffer zone of one-half mile around the tribe's sacred White Deerskin Dance area and trail. The proposal was included in the tribe's ten year forest management plan in

anticipation of a FY 95 tribal timber harvest of 10.4 million board feet. The Hoopa Valley Tribe itself had approximately $5 million worth of standing timber located within the no-cut zone. (Declaration of Nelson Colegrove, August 10, 1995, Exhibit "D", Hoopa Valley Tribal Court).

The harvest management plan included as one of its goals, to:

> *"protect cultural and religious resources within the proposed sale area."*

The notice went on to request public input on six specific matters, stating:

"... **Public Issues** which could affect the timber sale planning process have been identified. Public input and involvement is requested on these issues."

Among those issues was listed the following:

5. Buffer for Deerskin Dance Trail:

- A one half mile no-action buffer on either side of the trail and surrounding the site is proposed for any projects initiated by this process. Public input as to the adequacy of buffer is requested.

- Timber harvest may be proposed on fee land within the trail buffer. Can the Council regulate harvest on fee land to protect cultural sites? Forestry will consult with the BIA regarding this potentially precedence-setting action.

In addition to notifying all tribal allottees, the non-tribal owners of six parcels of fee land within the Bald Hill area, including the Gould Family Trust, were mailed a copy of the project proposal and request for public involvement, which was captioned as follows:

> BALD HILL LANDOWNERS: This letter outlines proposed timber harvest activities that

> could affect you or your property. Please review and contact Tribal Forestry or your Council Representative if you have any questions or comments.

At the time this notice was sent, the land in question was owned by the Gould Family Partnership. Coincident with the notice and public hearings being conducted, the Hoopa Valley Tribe prepared an archeological evaluation of the proposed timber harvest area and enlisted the participation of the Bureau of Indian Affairs in initiating a consultation with the State of California under Section 106 of the National Historic Preservation Act. The BIA letter stated in part:

> "*The results of [the] studies documented the presence of two archeological/cultural sites in the APE that are evaluated as potentially eligible for inclusion on the National Register of Historic Places. The site of the White Deerskin Dance Grounds and trail is considered very significant to the Tribe.*"

The letter further stated,

> "*As you can see from the enclosed AE document, the Hoopa Valley Tribe has prepared a plan to restrict any logging activities in the vicinity of the White Deerskin Dance Ground and associated trail that should avoid all impacts to the area, with the exception of minor visual impacts to the surrounding setting. The Tribe will provide a one half-mile buffer around the site for logging activity avoidance and will also restrict logging traffic in the area during the actual dance activities.*"

On January 28, 1995, following extensive consultations with tribal leaders involved in tribal ceremonial dances, two

public hearings and other public discussions in open tribal council meetings, the Hoopa Valley Tribal Council adopted a modified timber harvest plan for FY 1995 that included the following listed mitigation measures:

> CULTURAL 1) A ONE-HALF MILE BUFFER AROUND THE WHITE DANCE GROUND ON BALD HILL AND THE TRAIL LEADING TO IT WILL BE MAPPED AND ADHERED TO IN ALL ACTIVITIES ASSOCIATED WITH THE 1995 BALD HILL TIMBER SALE. NO TIMBER HARVEST UNITS OR OTHER TIMBER SALE-RELATED ACTIVITY (EXCEPT LOG TRUCKS AND OTHER VEHICLES PASSING THROUGH BUFFER ZONE ON MAIN ROADS) WILL BE LOCATED WITHIN THE BUFFER ZONE. THIS PROHIBITION OF ACTIVITIES WILL APPLY TO TRIBAL TRUST LAND, TRUST ALLOTMENTS, AND FEE LAND WITHIN THE ½ MILE BUFFER.
>
> CULTURAL 2) ON THE FRIDAY AND SATURDAY* WHEN THE WHITE DEERSKIN DANCE IS HELD ON BALD HILL, LOG HAULING FROM THE BALD HILL 1995 TIMBER SALE WILL CEASE, TO MINIMIZE DISTURBANCE TO THE DANCERS AND THOSE ATTENDING THE DANCE.
>
> *Actual dates will be determined by Dance Leaders.

The Hoopa Valley Tribal Council gave notice of this action to all Bald Hill land owners both by letter, and by publication in a local newspaper on January 25, and February 1, 1995.

On February 7, 1995, the Office of Historic Preservation for the State of California responded to the previous BIA consultation letter stating:

> "*In order to achieve a no effect determination the Tribe and BIA have identified means of protecting . . . . the White Deerskin Dance Site. These measures appear adequate, and I concur with your findings in these cases.*"

Appellant Bugenig purchased her land from the Gould Family Partnership on March 22, 1995 and recorded her deed in Humboldt County, California on June 1, 1995. The land is located near where her family has lived for nearly 150 years. On June 19, 1995 Appellant Bugenig applied to the State of California for a less than three acre conversion exemption, stating under penalty of perjury that she intended to convert 2.5 acres of her newly acquired land to pasture. On that same date, Appellant Bugenig appeared before the Tribal Council meeting to request a permit from the Tribe to haul logs cut from her property over Reservation land. That request was denied.

On July 5, 1995, an authorized representative of the Planning and Building Department of the County of Humboldt California found Bugenig's proposed conversion exemption to be:

> "*in conformance with the County's General Plan and Zoning regulations, and noticing requirements established pursuant thereto*"

and found that:

> *No discretionary permits are required for this conversion.*"

Appellant Bugenig indicated to the court that:

> "*(t)hroughout the planning process, she intended only to achieve her modest goal of building a home in which to live.*"

With the exemption, Appellant felt she:

> "*would be able to raise the money needed to fulfill her dreams of building her retirement home*",

and that to achieve that goal, she:

> "*was obliged to cut down some of the trees on her land.*"

Despite the previous denial of a tribal permit, Appellant Bugenig sent a personal check dated July 24, 1995 and made out to the Hoopa Valley Tribe containing the notation "Right of Way 1-95 EX-407-HUM". On July 26, Appellant Bugenig began cutting trees on her land. On July 28, Hoopa Valley Tribal Council Chairman Dale Risling, Sr. returned a check for $140 to Bugenig that had been sent to the tribe by Appellant to secure a hauling permit from the tribe to remove timber from her property. Chairman Risling directed Appellant to cease and desist from clearing timber, citing the fact that the Bugenig property was within the one-half mile buffer zone in which no logging was allowed.

On August 3, 1995 the Hoopa Valley Tribal Court issued a Temporary Restraining Order followed by an Order of Preliminary Injunction on August 10, 1995 restraining any timber harvest on the property. Appellant was subsequently notified by the State of California Department of Forestry and Fire Protection that her conversion exemption was being revoked. The initial correspondence dated October 10, 1995 indicated that:

> "*The Department concurs that the Hoopa Valley Indian Tribe is a legally recognized federal tribe, and can regulate activities within the Reservation boundaries. With this no-cut zone being a zoning issue as well as a designated archeological site, the Department feels the Tribe does have jurisdiction to restrict activities to protect the site' s integrity.*"

One week later, on October 17, the same agency wrote appellant once again, attempting to:

> "*clarify the Department' s position*"

and indicating that the grounds for revocation in the earlier letter:

> "*were not correctly stated.*"

The letter went on to state:

> "*The Conversion Exemption is not in compliance with the forest practice rules specifically 1104.1a(2). Under this subsection, no timber operations are allowed on significant historical or archeological sites. Such sites are defined in section 895.1 as sites that have significant or religious importance to California Indians as determined by the Native American Heritage Commission or locally federally recognized tribal government. Clearly, the Hoopa Valley Tribe is federally recognized and they have clearly designated the White Deerskin Danceground, Trail and the buffer zone as being of significant importance to the tribe.*"

On September 9, 1996, nearly a year after the revocation of her state exemption and in disregard of the Decision and Order of the Hoopa Valley Tribal Court, Appellant removed the cut

trees from her property utilizing a tribal road without a permit. She was found in civil contempt by the Tribal Court on October 24, 1996. Bugenig's appeal of the trial court's decision was accepted on April 21, 1997. Execution of the trial court's order was stayed pending this appeal, and the trial court granted Appellant's request for relief from posting a bond. The injunction barring logging activities on Appellant Bugenig's land remains in effect.

ISSUE ON APPEAL

The sole question presented on appeal for our consideration is succinctly stated in the appellant's brief: "*Did the trial court err as a matter of law when it ruled that the Tribe had jurisdiction over Appellant Bugenig's activities on her fee land located within the exterior boundaries of the Hoopa Valley Indian Reservation?*"

DISCUSSION

Both Appellant Bugenig and Respondent Hoopa Valley Tribe correctly point to the United States Supreme Court decisions in *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) as providing the legal standards by which the facts of this dispute must be measured. The court below relied upon the *Brendale* clarification of the so-called "*Montana* exceptions" in concluding that jurisdiction over the logging activities conducted on Appellant Bugenig's fee land was properly the subject of tribal jurisdiction. To appropriately apply those legal precedents to the case at hand demands an understanding of the specific facts of those cases, and an understanding of why and how the legal standards set forth in those decisions apply to the facts and circumstances existing on the Hoopa Valley Indian Reservation.

In *Montana*, the high court dealt with the sources and scope of the power of the Crow Indian Tribe of Montana to

regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians. The tribe's assertion of regulatory authority was premised upon its claim of ownership of the bed of the Bighorn River, on its treaties, and upon its inherent sovereignty. The facts of the case disclosed that under the First Treaty of Fort Laramie of 1851, 38.5 million acres of Crow territory were identified, in which the tribe did not "surrender the privilege of hunting, fishing, or passing over" any of the lands that came into dispute in the case. An 8 million acre Crow Reservation was subsequently established in the Second Treaty of Fort Laramie in 1868 that included land through which the Bighorn River flowed.

Congress later acted in 1882, in 1891, in 1904, and in 1937 to reduce the Crow Reservation, over time, to slightly more than 2.3 million acres. Additionally, the General Allotment Act of 1887 and the Crow Allotment Act of 1920 allowed individual tribal members to hold patents in fee of reservation land that could be sold to non-Indians after 25 years. Today, just slightly under 70 percent of the remaining reservation is still held in trust, 52 percent for individual allottees and 17 percent for the Crow Tribe. The United States owns less than 1 percent. Non-Indians hold 28 percent of the reservation in fee status, and the State of Montana owns about 2 percent.

When the Crow Tribal Council passed a resolution prohibiting hunting and fishing on the reservation by any non-tribal members, the State of Montana brought suit, having asserted its right to regulate the hunting and fishing of non-Indians, and having stocked the reservation with both fish and game since the 1920's. In examining the source and extent of the Crow Tribe's authority over hunting and fishing by non-Indians, the court stated, "*the regulatory issue before us is a narrow one.*" It found that neither the treaties nor the tribe's inherent sovereignty supported the Crow Tribe's claim to ownership of the riverbed, or to regulatory authority over non-Indian hunting and fishing on non-tribal land.

The court in *Montana* reviewed with favor a line of previous decisions that found the "*exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.*" at 564 (citiation omitted). The court felt that the hunting and fishing activities of non-Indians on non-tribal lands bore no clear relationship to tribal self-government or internal relations, thus, "*the general principles of retained inherent sovereignty did not authorize*" the tribe's resolution.

In further discussing its application of the general principals of retained soverignty, the court's opinion cited its own recent decision in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, in which a tribal claim of inherent sovereign authority to exercise criminal jurisdiction over non-Indians was rejected. But in once again restating the limitations, the court reaffirmed the circumstances where inherent sovereignty remained with tribes, citing a line of case authority stretching back to 1904, stating:

> "*To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. (citations omitted). A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the*

health or welfare of the tribe." (citations omitted).

The standard applied in the *Montana v. United States* decision became the stuff of vigorous and spirited discussion eight years later when the court considered *Brendale v. Confederated Tribes and Bands & Yakima Indian Nation el al.*, 492 U.S. 408. That case, involving land use questions arising from a tribal zoning ordinance, resembles more closely the dispute between Appellant Bugenig and the Hoopa Valley Tribe than do the hunting and fishing regulations in the *Montana* case. The 1.3 million acre Yakima Reservation contains land that is 80 percent trust land held by the United States for individual allottees and the tribe, and 20 percent fee land held by both Indians and non-Indians.

Brendale actually consisted of three separate but related actions: one involving a 160 acre tract owned by Mr. Brendale, located in a so-called "closed" portion of the Yakima Reservation where approximately 97 percent of the land remained in trust status; another involving a 40 acre tract owned by Mr Wilkinson in the so-called "open" area of the reservation where nearly half the land was in fee status; the third case arose from a challenge to the Yakima Tribe's zoning authority over fee land anywhere on the reservation brought by Yakima County.

In *Brendale*, the court produced a patchwork of opinions not unlike the various forms of land status existing on the Yakima Reservation. Despite rejecting tribal claims of zoning authority over the Wilkinson tract, and over most other fee land on the Yakima Indian Reservation, a majority opinion by Justice Stevens, joined by Justice O'Connor, and concurred in by separate opinion of Justice Blackmun, joined by Justice Brennan and Justice Marshall held that the Yakima Tribe possessed zoning authority over the Brendale property. The similarities between the Brendale property, located in an area of

the Yakima Indian Reservation that remains 97 percent tribally controlled, and where "*the Tribe has preserved the power to define the essential character of that area*" (at 3013) and the Bugenig land, located on a reservation that remains nearly 99 percent tribal and within an area of paramount spiritual importance to the Hupa people draws our attention.

In developing a standard of comparison for determining the right of a fee landholder to develop his parcel "*without regard to an otherwise common scheme*" *(Brendale* at 3014), Justice Stevens asked:

> "*More simply, the question is whether the owners of the small part of fee land may bring a pig into the parlor.*" *He went on to state,* "*. . . . the fact that a very small proportion of the closed area is owned in fee does not deprive the Tribe of the right to ensure that this area maintains its unadulterated character. This is particularly so in a case such as this in which the zoning rule at issue is neutrally applied, is necessary to protect the welfare of the Tribe, and does not interfere with any significant state or county interest.*" (at 3015).

At trial, the court found that:

> "*(b)y conducting logging activities not in compliance with Tribal law, the defendant acted in contravention of tribal law, threatening and physically disturbing the integrity and sacred status of the White Deerskin Dance area and Trial (sic).*"

The court also found that the activity:

> "*threatened the health and welfare of the Tribe and the Hoopa Valley People's customs and traditions.*" (Decision and Order at page 10).

The court further stated:

> "The Hoopa Valley Tribe has the power and authority to define areas of sacred significance and through establishment of the Buffer no-cut zone in the Bald Hill area, has exercised that power. *U.S. v. Montana*, 450 U.S. 544,566 (1981)."

Our attention is drawn to the footnote accompanying the case law cited by the Supreme Court in support of the second *Montana* exception, wherein the Court stated, "As a corollary, this Court has held that Indian tribes retain rights to river waters necessary to make their reservations livable. *Arizona v. California*, 373 U.S. 546, 599. Given that logic, it would seem to follow that a timber harvest regulation, neutrally applied, the purpose and effect of which is to preserve the sanctity of the Hoopa Tribe's most sacred spiritual location for the present and future use of tribal members would be a right retained by the Hupa people to ensure that their reservation remained livable. Or as Justice White would have it, the Hoopa Valley Tribe has neither relinquished nor seen abrogated, in the face of Appellant Bugenig's effort to "*bring a pig into the parlor*" of the White Deerskin Dance Ground, its inherent sovereign authority "*to ensure that this area maintains its unadulterated character.*" (*Brendale* at 3015).

CONCLUSION

We are unpersuaded by what appears in the record that Appellant's action in appearing at a Tribal Council meeting to request a permit to remove logs across tribal property constituted a sufficient instance of a "consensual relationship" or "commercial dealing" to make this dispute involving activities on the fee land itself subject to the first *Montana* exception allowing for tribal jurisdiction. We therefore reverse that portion of the lower court's decision.

Support for the Hoopa Valley Tribe's assertion of jurisdiction over the one percent fee land located on the Hoopa Valley Indian Reservation is found in the plain language of the Hoopa-Yurok Settlement Act of 1988 and its legislative history. We affirm that portion of the lower court's decision.

We further affirm the lower court's ruling that the *Brendale* standard as applied to the second *Montana* exception supports the right of the Hoopa Valley Tribe to implement neutrally applied regulations to reasonably restrict encroachment upon what tribal member and trial witness Byron Nelson described as that sacred "place "among the oak tops" on Bald Hill", where, "the legends say, the immortals watched the people of the valley dance with the precious white deerskins and the sacred obsidian blades."

ORDER

Therefore, based on the foregoing, it is hereby ordered that the judgement of the tribal court is reversed in part and affirmed in part.

Appendix G–1

HOOPA VALLEY TRIBAL COURT
HOOPA, CALIFORNIA

Filed July 11, 1996

HOOPA VALLEY TRIBE,	) **DOCKET NO. C-95-020**
	)
Plaintiffs,	) **DECISION and ORDER**
	)
v.	)
	)
ROBERTA BUGENIG,	)
Defendant.	)
	)

BACKGROUND:

Defendant, Roberta Bugenig, a non-Indian, purchased fee land, No. 525-091-17 & 18, as recorded by Humbolt Land and Title Company on June 1, 1995, within the exterior boundaries of the Hoopa Valley Indian Reservation, Hoopa, California.

Less than 1% of the Hoopa Valley Indian Reservation is owned by non-Indians.

In January of 1995, the Hoopa Valley Tribal Council established a one-half mile no-cut buffer zone around the White Deerskin Dance Trail on Bald Hill, as a part of the Tribe's on-going efforts to protect sacred sites on the Reservation. The Tribe gave notice to all Bald Hill land owners by letter and publication in the Kourier News Paper which serves the local area including the Hoopa Reservation. The notice stated "The Hoopa Valley Tribe Forestry Department has prepared an Environmental Assessment (EA) of the Bald Hill 1995 Timber Sale Project. The environmental assessment evaluates two alternatives based on the Tribe's recently adopted forest management plan. Both alternatives propose harvesting about

10.4 MBF from the planning area during the coming year, issues addressed in the EA include effects to the cultural resources including the Deerskin Dance Site, effects of road use on prehistoric archaeological sites, effects to domestic water sources, right of way for hauling tribal timber, maintenance of habitat for owls and effects to other threatened or endangered wildlife and bear damage in conifer plantations. Copies of the EA and draft decision notice are available from Tribal Forestry (916-625-4284.) Published in The Kourier, Willow Creek, California, on Wednesday, Jan. 25, and Feb. 1, 1995."

The defendant's land purchase of June 1, 1995 in the Bald Hill area is subject to the provisions in the Tribe's forest management plan.

The defendant has made conflicting statements about the intended use of the land.

On or about June 5, 1995, the defendant met with Mike Duguay, Registered Professional Forester (RPF), to lay out a proposed timber harvest with the implied intent of converting approximately 2.5 acres of the property into pasture. In a letter to the California Department of Forestry dated June 7, 1995, concerning a "Less Than 3 Acre Conversion" from Mr. Duguay stated that neighbors would be mailed copies of a notice of planned timber harvest. The letter went on to say that the notice was posted by Mike Duguay, RPF on June 7, 1995, but that "no comments had been received to date." It is difficult for the court to determine, from information provided, how comments could have been received. The letter to the California Department of Forestry was dated the same day as the posting.

The court has not received any information about where or how the notice was actually posted or testimony from neighbors who may have received or reviewed the notice.

A copy of the "Public Notice" provided to the court, indicates that it was received by the California Department of Forestry

Region 1, per the date stamp, on June 26, 1995 and again per a second date stamp on the same document, on July 7, 1995.

The Public Notice also indicated that a permit would be filed with the California Department of Forestry and Fire Protection, 5 days from the date shown on the notice. A letter from the California Department of Forestry and Fire Protection to the defendant dated July 12, 1995, acknowledged receipt of the actual letter in their office on July 7, 1995. A copy of the "Exemption From Timber Harvesting Plan Requirements" Section 1104.1 (a), title 14 of the California Code of Regulations, was to be given to the timber operator to keep at the work site. The court has not received information that assurances were met in compliance with California law and Forest Practice Act and Rules.

The court has reviewed a copy of a letter to the Hoopa Valley Tribal Council dated June 7, 1995 and a copy of the Hoopa Valley Tribal Council Agenda Request form provided, dated June 7, 1995. No information in these documents mention a timber harvest plan or is a "Public Notice" indicated to have been attached to the letter or the agenda request. So far as can be determined from information provided to the court, the Tribal Realty Office and the Hoopa Valley Tribal Council Natural Resources Department and Forestry Division did receive copies of the public notice on June 20, 1995. Thirteen calendar days after the notice was to be posted in a public place, and six calendar days before it was received by the California Department of Forestry, Region 1.

The court reviewed the information provided, concerning the volume of timber to be harvested from the site. And the correspondence to the California Department of Forestry.

Correspondence to the defendant from Mike Duguay, RPF a representative of Scott Valley Forestry, Etna, CA, indicates that he performed a 100% cruise on the property for Stone Forest Industries in approximately September, 1994. The volume of

timber represented to timber buyers was, Black Oak at 137 MBF and Conifers at 228 MBF, is based on approximately 45 acres of land. 100% cruise means all species were considered. The court visited and inspected the subject property on two separate occasions. Applying timber cruise methods used by professional foresters to determine actual volume of timber, the court has determined that amounts of timber to be harvested as mentioned by the defendant, including conifers and hardwood could not have been harvested from a 2.5 acre site as was indicated by application for a Less Than 3 Acre Conversion to qualify for "Exemption From Timber Harvesting Plan Requirements"—Section 1104.1 (a), Title 14 of the California Code of Regulations. As was certified by Mike Duguay, RPF this amount would have come from within the entire 45 acres, due to the scattered nature of the timber. Other documents received, indicate that proceeds would be shared with another property owner, the amount of the proceeds was based on the amount of timber on 45 acres not a 2.5 acre conversion as represented to the state by the defendant.

This court issued a Temporary Restraining Order and Notice of Hearing in this matter on August 3, 1995. On August 10, 1995 the court issued a Order of Preliminary Injunction, restraining the defendant and any persons from carrying out any timber operations on the subject property.

SUMMARY:

The Hoopa Valley Tribe is a sovereign government and has a government to government relationship with the United States of America. Affirmed at 25 USC Section 1300 i - 7.

The Hoopa Valley Tribal Council is the governing authority of the Hoopa Valley Tribe, Article V, Hoopa Valley Constitution, passed August 18, 1972.

The Tribal Court has jurisdiction in this matter in accordance with Hoopa Valley Tribal Code, at Section 1.1.04. The

jurisdiction of the Tribal Court includes all of the territory within the Hoopa Valley Reservation, including fee land.

As a land owner within the exterior boundaries of the Hoopa Valley Reservation, entering into activities and conducting business on the Reservation, the defendant, is clearly within the jurisdiction of the Hoopa Valley Tribal Court.

Consent to the jurisdiction of the Tribal court has been accepted by the defendant in accordance with Title 1, Hoopa Valley Tribal Code, Section 1.11.01.

In the instant case, the Tribe has authority to regulate activities on non-Indian fee land within the exterior boundaries of the Hoopa Valley Reservation, in order to preserve the Tribe's integrity and to protect Tribal member's health and welfare.

The Tribe in this case, has provided a letter sent in September 1994, from the Tribe to Bald Hill land owners regarding the proposed establishment of a buffer no-cut zone around the White Deerskin Dance area and Trail. The letter invited public input and a chance for land owners to comment.

The defendant states to the court that the Tribe did not provide "proper legal notice to the public in a paper of general circulation. The defendant goes on to say:

"I do not live by *there* religion and *there's* has caused me a great deal of health and welfare, and economic problems."

The defendant alleges that the Tribe has kept the defendant from the land, and states:

"threats and bad feelings have now arisen."

The defendant created a situation that could have been handled differently and in accordance with Tribal law.

The defendant purchased the land on the Hoopa Valley Indian Reservation after the establishment of the buffer no-cut zone. The defendant appeared at a Tribal Council meeting requesting

a permit to haul logs over Tribal regulated roads. A permit was not issued by the Tribal Council. The defendant without permit authority, went ahead with plans to haul mixed species of hardwood and conifers off the Reservation over Reservation roads.

The United States Supreme Court in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), found that a Tribe's authority to regulate non-Indian activity within the exterior boundaries of an Indian Reservation depended on the circumstances of the case. The test set by the Court takes into consideration: 1) the pattern of amounts of land ownership by non-Indians, the Tribe and Tribal members 2) neutrality in application of the law or regulation 3) protection of the peace and integrity, economic interests concerning health and welfare of the Tribe, and 4) interference with state or county interest.

Humbolt County does not have authority or subject matter jurisdiction within the exterior boundaries of the Hoopa Valley Reservation to regulate land use. This jurisdictional authority lies exclusively with the Hoopa Valley Tribal Council and membership of the Hoopa Valley Tribe.

The defendant's application to the California Department of Forestry for a timberland conversion permit in accordance with California Code of Regulations, Section 1104.1.1 (D) did not contain required information and was subsequently revoked by the California Department of Forestry.

The subject property lies within the half-mile no-action buffer zone as provided in the decision of the Hoopa Valley Tribal Council on January 28, 1995, protecting the White Deerskin Dance area and Trail and surrounding sites. By notice to Bald Hill Assigns/Allottees/Landowners by the Hoopa Valley Tribal Natural Resources Department and Forestry Division, on 9/19/94, Bald Hill Assigns/Allottees and Landowners were notified of the Tribe's Ten Year Forest Management Plan.

Furthermore, the notice provided at page 3, number 5, paragraph 2,

"Timber Harvest may be proposed on fee land within the trail buffer. Clearly this gave individuals who may have been effected opportunity to comment give input and work with Tribe on matters concerning property located in the area. The court has been provide with a copy of the Outgoing Mail Log of the Hoopa Valley Tribal Forestry Division, documenting that letters were mailed to Bald Hill landowners. According to this documentation, notice concerning the defendant's property, which was at that time owned by the Gould Family Partnership, was sent to P. O. Box 547, Bayside, California 95524-0547.

ORDER:

The court having been fully advised concerning the issues presented, hereby finds:

1) The Hoopa Valley Tribal Council acting on behalf of Tribal membership is dedicated to preservation of sacred sites within the exterior boundaries of the Hoopa Valley Reservation. The White Deerskin Dance Trail and sacred sites in the Bald Hill area are among the most sacred of the sites. The Tribal Council, by establishing the buffer no-cut zone in January of 1995, is working to preserve and protect the White Deerskin Dance area, Trail and sites in the area.

2) By conducting logging activities not in compliance with Tribal law, the defendant acted in contravention of Tribal law, threatening and physically disturbing the integrity and sacred status of the White Deerskin Dance area and Trial.

3) This blatant disregard of Tribal law, threatened the health and welfare of the Tribe and the Hoopa Valley People's customs and traditions.

It is hereby ordered that:

The Hoopa Valley Tribe has the power and authority to define areas of sacred significance and through establishment of the Buffer no-cut zone in the Bald Hill area, has exercised that power. *U.S. v. Montana*, 450 U.S. 544, 566 (1981).

The plaintiff is entitled to a judgement as a matter of law.

1) A permanent injunction barring logging activities in the buffer no-cut zone, except as approved and supervised by the Hoopa Valley Tribal Forestry Department is hereby ordered.

2) The defendant is further ordered to clean up the above mentioned parcels at the defendant's own expense, remove all cut logs and slash from the mentioned parcels under supervision of the Hoopa Valley Tribal Forestry Department within 60 days of the issuance of this order.

3) The Hoopa Valley Tribal Forestry Department is to work with the defendant to determine how the area might best be restored to its former state in conformance with Tribal standards. A copy of these findings and plans are to be supplied to the court within 60 days of the issuance of this order.

4) The defendant is further ordered to pay costs associated with this action which were incurred by the Hoopa Valley Tribe. Including attorney fees and related costs, and costs incurred by the Tribal Forestry Department. A list of these costs are to be supplied to the court for *review and approval* within 60 days.

5) In accordance with applicable Hoopa Valley Tribal Law and within the scope of California Code of Regulations and licensing requirements, the Hoopa Valley Tribal Attorney's office is directed to investigate and determine through a written report, provided to the court with 30 days, if the Timber Operator, Steve Ross, P.O. Box 986, Hoopa California 95546 or the Registered Professional Forester, Mike Duguay, P.O.

Box 9, Etna, California 96027, who engaged in the aforementioned activities with the defendant, should share in the cost of restoring the area. In conformance with Tribal standards.

So Ordered, this 11th day of July.

/s/ David L. Harding
Judge David L. Harding
Hoopa Valley Tribal Court

Excerpts from 25 U.S.C. § 1300i, *et seq.*

25 USC Sec. 1300

TITLE 25 - INDIANS

CHAPTER 14 - MISCELLANEOUS

SUBCHAPTER LXXX - HOOPA-YUROK SETTLEMENT

Sec. 1300i. Short title and definitions

(a) Short title

This subchapter may be cited as the "Hoopa-Yurok Settlement Act".

(b) Definitions

For the purposes of this subchapter, the term -

(1) "'Escrow funds" means the moneys derived from the joint reservation which are held in trust by the Secretary in the accounts entitled -

(A) "Proceeds of Labor-Hoopa Valley Indians-California 70 percent Fund, account number J52-561-7197";

(B) "Proceeds of Labor-Hoopa Valley Indians-California 30 percent Fund, account number J52-561-7236";

(C) "Proceeds of Klamath River Reservation, California, account number J52-562-7056";

(D) "Proceeds of Labor-Yurok Indians of Lower Klamath River, California, account number J52-562-7153";

(E) "Proceeds of Labor-Yurok Indians of Upper Klamath River, California, account number J52-562-7154";

(F) "Proceeds of Labor-Hoopa Reservation for Hoopa Valley and Yurok Tribes, account number J52-575-7256"; and

(G) "Klamath River Fisheries, account number 5628000001";

(2) "Hoopa Indian blood" means that degree of ancestry derived from an Indian of the Hunstang, Hupa, Miskut, Redwood, Saiaz, Sermalten, Tish-Tang-Atan, South Fork, or Grouse Creek Bands of Indians;

(3) "Hoopa Valley Reservation" means the reservation described in section 1300i-l(b) of this title;

(4) "Hoopa Valley Tribe" means the Hoopa Valley Tribe, organized under the constitution and amendments approved by the Secretary on November 20, 1933, September 4, 1952, August 9,1963, and August 18, 1972;

(5) "Indian of the Reservation" shall mean any person who meets the criteria to qualify as an Indian of the Reservation as established by the United States Court of Claims in its March 31, 1982, May 17, 1987, and March 1, 1988, decisions in the case of *Jesse Short et al. v. United States*, (Cl. Ct. No. 102-63);

(6) "Joint reservation" means the area of land defined as the Hoopa Valley Reservation in section 1300i-l(b) of this title and the Yurok Reservation in section 1300i-l(c) of this title.

(FOOTNOTE 1)

(FOOTNOTE 1) So in original. The period probably should be a semicolon.

(7) "Karuk Tribe" means the Karuk Tribe of California, organized under its constitution on April 6, 1985;

(8) "Secretary" means the Secretary of the Interior;

(9) "Settlement Fund" means the Hoopa-Yurok Settlement Fund established pursuant to section 1300i-3 of this title;

(10) "Settlement Roll" means the final roll prepared and published in the Federal Register by the Secretary pursuant to section 1300i-4 of this title;

(11) "Short cases" means the cases entitled *Jesse Short et al. v. United States*, (Cl. Ct. No. 102-63); *Charlene Ackley v. United States*, (Cl. Ct. No. 460-78); *Bret Aanstadt v. United States*, (Cl. Ct. No. 146-85L); and *Norman Giffen v. United States*, (Cl. Ct. No. 746-85L);

(12) "Short plaintiffs" means named plaintiffs in the *Short* cases;

(13) "trust land" means an interest in land the title to which is held in trust by the United States for an Indian or Indian tribe, or by an Indian or Indian tribe subject to a restriction by the United States against alienation;

(14) "unallotted trust land, property, resources or rights" means those lands, property, resources, or rights reserved for Indian purposes which have not been allotted to individuals under an allotment Act;

(15) "Yurok Reservation" means the reservation described in section 1300i-1(c) of this title; and

(16) "Yurok Tribe" means the Indian tribe which is recognized and authorized to be organized pursuant to section 1300i-8 of this title.

REFERENCES IN TEXT

This subchapter, referred to in subsecs. (a) and (b), was in the original "this Act", meaning Pub. L. 100-580, Oct. 31, 1988, 102 Stat. 2924, which enacted this subchapter, amended section 407 of this title and section 460ss-3 of Title 16, Conservation, and enacted provisions set out as a note under section 460ss-3 of Title16. For complete classification of this Act to the Code, see Tables.

25 USC Sec. 1300i-1

TITLE 25 - INDIANS

CHAPTER 14 - MISCELLANEOUS

SUBCHAPTER LXXX - HOOPA-YUROK SETTLEMENT

Sec. 1300i-1. Reservations; partition and additions

(a) Partition of the joint reservation

(1) Effective with the publication in the Federal Register of the Hoopa tribal resolution as provided in paragraph (2), the joint reservation shall be partitioned as provided in subsections (b) and (c) of this section.

(2) (A) The partition of the joint reservation as provided in this subsection, and the ratification and confirmation as provided by section 1300i-7 of this title, shall not become effective unless, within 60 days after October 31, 1988, the Hoopa Valley Tribe shall adopt, and transmit to the Secretary, a tribal resolution:

(i) waiving any claim such tribe may have against the United States arising out of the provisions of this subchapter, and

(ii) affirming tribal consent to the contribution of Hoopa Escrow monies to the Settlement Fund, and for their use as payments to the Yurok Tribe, and to individual Yuroks, as provided in this subchapter.

(B) The Secretary, after determining the validity of the resolution transmitted pursuant to subparagraph (A), shall cause such resolution to be printed in the Federal Register.

(b) Hoopa Valley Reservation

Effective with the partition of the joint reservation as provided in subsection (a) of this section, the area of land

known as the "square" (defined as the Hoopa Valley Reservation established under section 2 of the Act of April 8, 1864 (13 Stat. 40), the Executive Order of June 23, 1876, and Executive Order 1480 of February 17, 1912) shall thereafter be recognized and established as the Hoopa Valley Reservation. The unallotted trust land and assets of the Hoopa Valley Reservation shall thereafter be held in trust by the United States for the benefit of the Hoopa Valley Tribe.

(c) Yurok Reservation

(1) Effective with the partition of the joint reservation as provided in subsection (a) of this section, the area of land known as the "extension" (defined as the reservation extension under the Executive Order of October 16, 1891, but excluding the Resighini Rancheria) shall thereafter be recognized and established as the Yurok Reservation. The unallotted trust land and assets of the Yurok Reservation shall thereafter be held in trust by the United States for the benefit of the Yurok Tribe.

(2) Subject to all valid existing rights and subject to the adoption of a resolution of the Interim Council of the Yurok Tribe as provided in section 1300i-8(d) (2) of this title, all right, title, and interest of the United States -

(A) to all national forest system lands within the Yurok Reservation, and

(B) to that portion of the Yurok Experimental Forest described as Township 14 N., Range 1 E., Section 28, Lot 6: that portion of Lot 6 east of U.S. Highway 101 and west of the Yurok Experimental Forest, comprising 14 acres more or less and including all permanent structures thereon, shall thereafter be held in trust by the United States for the benefit of the Yurok Tribe and shall be part of the Yurok Reservation.

(3) (A) Pursuant to the authority of sections 465 and 467 of this title, the Secretary may acquire from willing sellers

lands or interests in land, including rights-of-way for access to trust lands, for the Yurok Tribe or its members, and such lands may be declared to be part of the Yurok Reservation.

(B) From amounts authorized to be appropriated by section 13 of this title, the Secretary shall use not less than $5,000,000 for the purpose of acquiring lands or interests in lands pursuant to subparagraph (A). No lands or interests in lands may be acquired outside the Yurok Reservation with such funds except lands adjacent to and contiguous with the Yurok Reservation or for purposes of exchange for lands within the reservation.

(4) The -

(A) apportionment of funds to the Yurok Tribe as provided in sections 1300i-3 and 1300i-6 of this title;

(B) the land transfers pursuant to paragraph (2);

(C) the land acquisition authorities in paragraph (3); and

(D) the organizational authorities of section 1300i-8 of this title shall not be effective unless and until the Interim Council of the Yurok Tribe has adopted a resolution waiving any claim such tribe may have against the United States arising out of the provisions of this subchapter.

(d) Boundary clarifications or corrections

(1) The boundary between the Hoopa Valley Reservation and the Yurok Reservation, after the partition of the joint reservation as provided in this section, shall be the line established by the Bissel-Smith survey.

(2) Upon the partition of the joint reservation as provided in this section, the Secretary shall publish a description of the boundaries of the Hoopa Valley Reservation and Yurok Reservation in the Federal Register.

(e) Management of the Yurok Reservation

The Secretary shall be responsible for the management of the unallotted trust land and assets of the Yurok Reservation until such time as the Yurok Tribe has been organized pursuant to section 1300i-8 of this title. Thereafter, those lands and assets shall be administered as tribal trust land and the Yurok reservation governed by the Yurok Tribe as other reservations are governed by the tribes of those reservations.

(f) Criminal and civil jurisdiction

The Hoopa Valley Reservation and Yurok Reservation shall be subject to section 1360 of title 28; (FOOTNOTE 1) section 1162 of title 18, and section 1323(a) of this title.

(FOOTNOTE 1) So in original. The semicolon probably should be a comma.

(Pub. L. 100-580, Sec. 2, Oct. 31, 1988, 102 Stat. 2925.)

REFERENCES IN TEXT

Section 2 of the Act of April 8, 1864, referred to in subsec. (b), is sectien 2 of act Apr. 8, 1864, ch. 48, 13 Stat. 40, which was not classified to the Code.

Executive Order of June 23, 1876, and Executive Order 1480 of February 17, 1912, referred to in subsec. (b), are not classified to the Code.

Executive Order of October 16, 1891, referred to in subsec. (c), is not classified to the Code.

HOOPA VALLEY RESERVATION
SOUTH BOUNDARY ADJUSTMENT

Pub. L. 105-79, Nov. 13, 1997, 111 Stat. 1527, as amended by Pub. L. 105-256, Sec. 6, Oct. 14, 1998, 112 Stat. 1897, provided that:

"SECTION 1. SHORT TITLE.

"This Act may be cited as the 'Hoopa Valley Reservation South Boundary Adjustment Act'.

"SEC. 2. TRANSFER OF LANDS WITHIN SIX RIVERS NATIONAL FOREST FOR HOOPA VALLEY TRIBE.

"(a) Transfer. - All right, title, and interest in and to the lands described in subsection (b) shall hereafter be administered by the Secretary of the Interior and be held in trust by the United States for the Hoopa Valley Tribe. The lands are hereby declared part of the Hoopa Valley Reservation. Upon the inclusion of such lands in the Hoopa Valley Reservation, Forest Service system roads numbered 8N03 and 7N51 and the Trinity River access road which is a spur off road numbered 7N51, shall be Indian reservation roads, as defined in section 101(a) of title 23 of the United States Code.

"(b) Lands Described. - The lands referred to in subsection (a) are those portions of Townships 7 North and 8 North, Ranges 5 East and 6 East, Humboldt Meridian, California, within a boundary beginning at a point on the current south boundary of the Hoopa Valley Indian Reservation, marked and identified as 'Post H.V.R. No. 8' on the Plat of the Hoopa Valley Indian Reservation prepared from a field survey conducted by C.T. Bissel, Augustus T. Smith, and C.A. Robinson, Deputy Surveyors, approved by the Surveyor General, H. Pratt, March 18, 1892, and extending from said point on a bearing of north 73 degrees 50 minutes east, until intersecting with a line beginning at a point marked as 'Post H.V.R. No. 3' on such survey and extending on a bearing of south 14 degrees 36 minutes east, comprising 2,641 acres more or less.

"(c) Boundary Adjustment. - The boundary of the Six Rivers National Forest in the State of California is hereby adjusted to exclude the lands to be held in trust for the benefit of the Hoopa Valley Tribe pursuant to this section.

"(d) Survey. - The Secretary of the Interior, acting through the Bureau of Land Management) shall survey and monument that portion of the boundary of the Hoopa Valley Reservation established by the addition of the lands described in subsection (b).

"(e) Settlement of Claims. - The transfer of lands to trust status under this section extinguishes the following claims by the Hoopa Valley Tribe:

"(1) All claims on land now administered as part of the Six Rivers Naticnal Forest based on the allegation of error in establishing the boundaries of the Hoopa Valley Reservation, as those boundaries were configured before the date of the enactment of this Act (Nov. 13, 1997).

"(2) All claims of failure to pay just compensation for a taking under the fifth amendment of the United States Constitution, if such claims are based on activities, occurring before the date of the enactment of this Act, related to the lands transferred to trust status under this section."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1300i, 1300i-11 of this title.

25 USC Sec. 1300i-2

TITLE 25 - INDIANS

CHAPTER 14 - MISCELLANEOUS

SUBCHAPTER LXXX - HOOPA-YUROK SETTLEMENT

Sec. 1300i-2. Preservation of Short cases

Nothing in this subchapter shall affect, in any manner, the entitlement established under decisions of the United States Court of Federal Claims in the *Short* cases or any final judgment which may be rendered in those cases.

(Pub. L. 100-580, Sec. 3, Oct. 31, 1988, 102 Stat. 2927; Pub. L. 102-572, title IX, Sec. 902(b) (1), Oct. 29, 1992, 106 Stat. 4516.)

AMENDMENTS

1992 - Pub. L. 102-572 substituted "United States Court of Federal Claims" for "United States Claims Court".

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

25 USC Sec. 1300i-7

TITLE 25 - INDIANS

CHAPTER 14 - MISCELLANEOUS

SUBCHAPTER LXXX - HOOPA-YUROK SETTLEMENT

Sec. 1300i-7. Hoopa Valley Tribe; confirmation of status

The existing govening (FOOTNOTE 1) documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed.

(FOOTNOTE 1) So in original. Probably should be "governing".

(Pub. L. 100-580, Sec. 8, Oct. 31, 1988, 102 Stat. 2932.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1300i-1 of this title.

25 USC Sec. 1300i-8 01/23/00

TITLE 25 - INDIANS

CHAPTER 14 - MISCELLANEOUS

SUBCHAPTER LXXX - HOOPA-YUROK SETTLEMENT

Sec. 1300i-8. Recognition and organization of the Yurok Tribe

(a) Yurok Tribe

(1) Those persons on the Settlement Roll who made a valid election pursuant to subsection (c) of section 1300i-5 of this title shall constitute the base membership roll for the Yurok Tribe whose status as an Indian tribe, subject to the adoption of the Interim Council resolution as required by subsection (d)(2) of this section, is hereby ratified and confirmed.

(2) The Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461 et seq.), as amended, is hereby made applicable to the Yurok Tribe and the tribe may organize under such Act as provided in this section.

(3) Within thirty days (30) after October 31, 1988, the Secretary, after consultation with the appropriate committees of Congress, shall appoint five (5) individuals who shall comprise the Yurok Transition Team which, pursuant to a budget approved by the Secretary, shall provide counseling and assistance, shall promote communication with potential members of the Yurok Tribe concerning the provisions of this subchapter, and shall study and investigate programs, resources, and facilities for consideration by the Interim Council. The Yurok Transition Team may receive grants and enter into contracts for the purpose of carrying out this section and section 1300i-9(a) of this title. Such grants and contracts shall be transferred to the Yurok Interim Council upon its organization.

Any property acquired for or on behalf of the Yurok Transition Team shall be held in the name of the Yurok Tribe.

(b) Interim Council; establishment

There shall be established an Interim Council of the Yurok Tribe to be composed of five members. The Interim Council shall represent the Yurok Tribe in the implementation of provisions of this subchapter, including the organizational provisions of this section, and subject to subsection (d) of this section shall be the governing body of the tribe until such time as a tribal council is elected under a constitution adopted pursuant to subsection (e) of this section.

(c) General council; election of Interim Council

(1) Within 30 days after the date established pursuant to section 1300i-5(a)(4) of this title, the Secretary shall prepare a list of all persons eighteen years of age or older who have elected the Yurok Tribal Membership Option pursuant to section 1300i-5(c) of this title, which persons shall constitute the eligible voters of the Yurok Tribe for the purposes of this section, and shall provide written notice to such persons of the date, time, purpose, and order of procedure for the general council meeting to be scheduled pursuant to paragraph (2) for the consideration of the nomination of candidates for election to the Interim Council.

(2) Not earlier than 30 days before, nor later than 45 days after, the notice provided pursuant to paragraph (1), the Secretary shall convene a general council meeting of the eligible voters of the Yurok Tribe on or near the Yurok Reservation, to be conducted under such order of procedures as the Secretary determines appropriate, for the nomination of candidates for election of members of the Interim Council. No person shall be eligible for nomination who is not on the list prepared pursuant to this section.

(3) Within 45 days after the general council meeting held pursuant to paragraph (2), the Secretary shall hold an election by secret ballot, with absentee balloting and write-in voting to be permitted, to elect the five members of the Interim Council from among the nominations submitted to him from such general council meeting. The Secretary shall assure that notice of the time and place of such election shall be provided to eligible voters at least fifteen days before such election.

(4) The Secretary shall certify the results of such election and, as soon as possible, convene an organizational meeting of the newly-elected members of the Interim Council and shall provide such advice and assistance as may be necessary for such organization.

(5) Vacancies on the Interim Council shall be filled by a vote of the remaining members.

(d) Interim Council; authorities and dissolution

(1) The Interim Council shall have no powers other than those given to it by this subchapter.

(2) The Interim Council shall have full authority to adopt a resolution -

(i) waiving any claim the Yurok Tribe may have against the United States arising out of the provision of this subchapter, and

(ii) affirming tribal consent to the contribution of Yurok Escrow monies to the Settlement Fund, and for their use as payments to the Hoopa Tribe, and to individual Hoopa members, as provided in this subchapter, and

(iii) to receive grants from, and enter into contracts for, Federal programs, including those administered by the Secretary and the Secretary of Health and Human Services, with respect to Federal services and benefits for the tribe and its members.

(3) The Interim Council shall have such other powers, authorities, functions, and responsibilities as the Secretary may recognize, except that any contract or legal obligation that would bind the Yurok Tribe for a period in excess of two years from the date of the certification of the election by the Secretary shall be subject to disapproval and cancellation by the Secretary if the Secretary determines that such a contract or legal obligation is unnecessary to improve housing conditions of members of the Yurok Tribe, or to obtain other rights, privileges or benefits that are in the long-term interest of the Yurok Tribe.

(4) The Interim Council shall appoint, as soon as practical, a drafting committee which shall be responsible, in consultation with the Interim Council, the Secretary and members of the tribe, for the preparation of a draft constitution for submission to the Secretary pursuant to subsection (e) of this section.

(5) The Interim Council shall be dissolved effective with the election and installation of the initial tribe (FOOTNOTE 1) governing body elected pursuant to the constitution adopted under subsection (e) of this section or at the end of two years after such installation, whichever occurs first.

(FOOTNOTE 1) So in original. Probably should be "tribal".

(e) Organization of Yurok Tribe

Upon written request of the Interim Council or the drafting committee and the submission of a draft constitution as provided in paragraph (4) of subsection (d) of this section, the Secretary shall conduct an election, pursuant to the provisions of the Indian Reorganization Act of June 18, 1934 (25 U.S.C. 461 et seq.) and rules and regulations promulgated thereunder, for the adoption of such constitution and, working with the

Interim Council, the election of the initial tribal governing body upon the adoption of such constitution.

(Pub. L. 100-580, Sec. 9, Oct. 31, 1988, 102 Stat. 2932; Pub. L. 101-121, title III, Sec. 315, Oct. 23, 1989, 103 Stat. 744; Pub. L. 101-301, Sec. 9(3), May 24, 1990, 104 Stat. 211.)

REFERENCES IN TEXT

The Indian Reorganization Act, referred to in subsecs. (a)(2) and (e), is act June 18, 1934, ch. 576, 48 Stat. 984, as amended, which is classified generally to subchapter V (Sec. 461 et seq.) of this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

AMENDMENTS

1990 - Subsec. (a)(3). Pub. L. 101-301 substituted "counseling and assistance, shall" for "counseling,".

1989 - Subsec. (a)(3). Pub. L. 101-121 inserted provisions authorizing the Yurok Transition Team to receive grants and enter into contracts for the purpose of carrying out this section and section 1300i-9(a) of this title and directing that such grants and contracts be transferred to the Yurok Interim Council upon its organization.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1300i, 1300i-1, 1300i-5, 1300i-10, 1300i-11 of this title.

Appendix I–1

Excerpts from the
CONSTITUTION AND BYLAWS

of the

HOOPA VALLEY TRIBE

HOOPA VALLEY INDIAN RESERVATION

(Amended June 18, 1996)

PREAMBLE

We, the members of the Hoopa Valley Tribe in California, in order to exercise our tribal rights and promote our common welfare do hereby ordain and establish this Constitution and Bylaws.

ARTICLE 1 - PURPOSE

The purpose of this Constitution and Bylaws shall be to protect and promote the interests of the Hoopa Valley Indians, to develop cooperative relations with the agencies of the Federal Government and to cooperate with State and local governments. Upon its effective date this revised Constitution and Bylaws shall supersede the Tribe's initial governing document, approved September 4, 1952. All existing ordinances, resolutions or any other enactment or policies of the Tribe, which are not in conflict with the provisions of this revised constitution and bylaws shall remain in effect.

ARTICLE II - NAME

The Tribal organization shall be called "The Hoopa Valley Tribe."

ARTICLE III - TERRITORY

The jurisdiction of the Hoopa Valley Tribe shall extend to all lands within the confines of the Hoopa Valley Indian Reservation boundaries as established by Executive Order of

June 23, 1876, and to such other lands as may hereafter be acquired by or for the Hoopa Valley Indians.

* * *

ARTICLE IX - POWERS AND DUTIES OF TRIBAL COUNCIL

Section 1. The Tribal Council shall have the following powers subject to any limitations imposed by federal statutes or by the Constitution of the United States.

(a) To administer all tribal property. Toward this end a land assignment ordinance shall be submitted for ratification to a referendum vote within one year of the effective date of this revised constitution and bylaws.

* * *

(d) To purchase in the name of the Hoopa Valley Tribe any land or other property the Council may deem beneficial to said Hoopa Valley Indians.

(e) To enforce the protection of Tribal property, wildlife and natural resources of the Hoopa Valley Tribe in accordance with a conservation ordinance which shall be enacted within one year from effective date of this revised constitution.

* * *

(k) To promulgate and enforce ordinances governing the conduct of members and nonmembers of the Hoopa Valley Indian Tribe.

(l) To safeguard and promote the peace, safety, morals and general welfare of the Hoopa Valley Indians by regulating the conduct of trade and the use and disposition of property upon the reservation, provided that any ordinance directly affecting non-members of the Hoopa Valley Tribe shall be subject to the approval of the Commissioner of Indian Affairs or his authorized representative.

Appendix J–1

DECISION OF HOOPA VALLEY TRIBAL COUNCIL

January 28, 1995

ALTERNATIVE FOR FY 1995 TIMBER SALE PROGRAM BALD HILL, BALD HILL GORGE, PUMPKIN CAMP and NORTH BEAVER CREEK COMPARTMENTS HOOPA VALLEY INDIAN RESERVATION

An interdisciplinary team (IDT) composed of resource management specialists from Tribal departments has prepared an environmental assessment (EA) for proposed timber management alternatives in the Bald Hill, Bald Hill Gorge, Pumpkin Camp, and North Beaver Creek compartments. The process of public scoping and EA preparation is documented in the attached EA.

The attached EA is tiered to the tribe's Ten-Year Forest Management Plan (FMP) and to the analysis of alternative 3C as documented in the Environmental Assessment for the FMP. Alternative 3C was selected by the tribe to be implemented in the FMP. The goal of alternative 3C is to maximize the long term sustained yield average on the Reservation's intensively managed landbase, with major restrictions specified in harvest methods to mitigate wildlife impacts.

The interdisciplinary team developed and evaluated two action alternatives referred to in the EA as alternatives 1 and 2. The alternatives for the proposed action are consistent with, and tiered to, alternative 3C. Alternatives 1 and 2 differ in their approach toward timber, viewshed, wildlife, and domestic water source management.

After evaluation of each alternative, the interdisciplinary team chose a modified version of action alternative 1 as its recommended alternative. On January 28, 1995, the Tribal Council adopted modified alternative 1 as the preferred

alternative, with the following stipulations, as quoted from the Council Action Sheet:

> "*That the Tribe negotiate in good faith to resolve concerns related to right of way agreements made with Bald Hill land owners; also to identify domestic source water alternatives for the Bald Hill district; and keep open the option for fire suppression storage tanks for PUD* (Public Utilities Department) *to monitor; and to direct PUD to apply for domestic water grants for Bald Hill.*"

Modified alternative 1 departs from original alternative 1 in:

1) adopting the spotted owl management guidelines of alternative 2 for the NW 1/4 of T9N, R4E. This quarter township is deficient in spotted owl dispersal habitat, based on US Fish and Wildlife Service Guidelines.

2) protecting all domestic water sources located within the project area to the same degree, rather than only deeded domestic sources.

Modified alternative 1 would encompass the following activities:

- harvest up to 10.4 MMBF of net conifer volume and up to 2.2 MMBF of hardwoods
- clearcut logging of 45 acres, mostly using tractors
- partial cutting of 349 acres, about half by tractors and half by cable
- rock pit development at possibly 3 existing sites and 1 new site, each about 1-3 acres each (permits required under the Surface Mining Protection Ordinance will be obtained by the Tribal Geologist, for rock pits locations noted in the EA, before beginning operations)

- water source development at three existing locations, and installation of one 10,000 gallon water tank on the 7N road for dust abatement and fire use
- road maintenance and reconstruction on 28 miles of existing single and two lane roads
- 2.2 miles of new local one lane road construction
- slash disposal by YUM yarding, lopping and scattering, etc.
- site preparation by burning, tractor piling, etc.
- tree planting on approximately 400 acres
- precommercial thinning of up to 1,737 acres

The following activities that originally were components of alternative 1 are not included in the proposed action, because analysis of the consequences of these activities was not conducted during the EA process. These actions could be conducted concurrent with the proposed action if their consequences were evaluated in a separate environmental document such as an EA or Categorical Exemption.

- cultural burning to reestablish prairies
- installation of up to three large (appx. 20,000 gallon) water storage tanks for wildfire and dust abatement purposes

Activities discussed in the EA which the IDT has decided not to include in this project are:

- building a tie through road between the 7F Road and the 701C Road
- building a tie through road through block 2 between Bloody Camp and Pine Creek Roads

- replacement of two culverts on a section of Dowd Road not planned for timber haul

ENVIRONMENTAL CONSEQUENCES

The consequences of timber management on the environment, both socioeconomic and physical, are considered in the EA for the proposed project. Impacts to the following resource areas were identified as potentially significant:

- effects to cultural resources including the Deerskin Dance Site and un-marked grave sites
- effects of increased road use to one prehistoric archaeological site potentially eligible for listing with the National Register
- effects to domestic water sources
- right-of-way for hauling tribal timber across Indian allotments
- tribal regulation of forest practices to private land and allotments within the reservation
- maintenance of dispersal/foraging habitat for spotted owls, effects to other threatened or endangered wildlife species
- bear damage to conifer plantations

A discussion of these resource areas is contained within the body of the EA. Mitigation measures to reduce impacts to these resource areas are listed below:

MITIGATION MEASURES

CULTURAL 1) A ONE HALF-MILE BUFFER AROUND THE WHITE DANCE GROUND ON BALD HILL AND THE TRAIL LEADING TO IT WILL BE MAPPED AND ADHERED TO IN ALL ACTIVITIES ASSOCIATED WITH THE 1995 BALD HILL TIMBER SALE. NO TIMBER HARVEST UNITS OR OTHER TIMBER SALE-RELATED

ACTIVITY (EXCEPT LOG TRUCKS AND OTHER VEHICLES PASSING THROUGH BUFFER ZONE ON MAIN ROADS) WILL BE LOCATED WITHIN THIS BUFFER ZONE. THIS PROHIBITION OF ACTIVITIES WILL APPLY TO TRIBAL TRUST LAND, TRUST ALLOTMENTS, AND FEE LAND WITHIN THE ½ MILE BUFFER.

CULTURAL 2) ON THE FRIDAY AND SATURDAY * WHEN THE WHITE DEERSKIN DANCE IS HELD ON BALD HILL, LOG HAULING FROM THE BALD HILL 1995 TIMBER SALE WILL CEASE, TO MINIMIZE DISTURBANCE TO THE DANCERS AND THOSE ATTENDING THE DANCE.

CULTURAL 3) MEMBERS OF THE IDT WILL VISIT THE PROJECT AREA WITH TRIBAL MEMBERS HAVING KNOWLEDGE OF GRAVE SITES. IDENTIFIED SITES SHALL BE MAPPED, AND IF NECESSARY IDENTIFIED ON THE GROUND, TO FACILITATE THEIR AVOIDANCE BY TIMBER SALE RELATED ACTIVITIES.

CULTURAL 4) REQUIRE IN TIMBER SALE CONTRACT IF ANY BURIAL SITES OR OTHER CULTURAL SITES ARE DISCOVERED DURING OPERATION, OPERATIONS WILL CEASE IMMEDIATELY AND THE SALE ADMINISTRATOR NOTIFIED SO APPROPRIATE EVALUATION MEASURES CAN PROCEED.

ARCHAEOLOGY 1) DURING INITIAL ROAD IMPROVEMENT, THE PORTION OF THE ROAD THAT TRAVERSES [A SPECIFIC] SITE WILL BE COVERED WITH 3" MINUS SCREENED GRAVEL TO A DEPTH IN EXCESS OF 1 FOOT, TO A WIDTH ENCOMPASSING THE ENTIRE CLEARED AREA SURROUNDING THE ROAD, TO THE EDGE OF THE SURROUNDING VEGETATION. ALL EQUIPMENT WILL BE LIMITED TO OPERATING ON THE NEWLY IMPORTED MATERIAL, ONLY. IN ADDITION, AN ON-SITE MONITOR WHO HAS SUCCESSFULLY COMPLETED THE STATE OF CALIFORNIA'S ARCHAEOLOGICAL TRAINING FOR RPF'S WILL BE PRESENT 100% OF THE TIME DURING THE IMPORTATION AND COMPLETION OF THE RECONSTRUCTION ACTIVITIES IN OR NEAR THE SITE.

---

* Actual dates will be determined by Dance Leaders.

ANY ARTIFACTS WITHIN THIS AREA WILL BE COVERED BY THE ROCK LAYER AND PROTECTED FROM VEHICLE TRAFFIC OR LIGHT MAINTENANCE ACTIVITIES.

WATER QUALITY 1) IN ORDER THAT VEGETATIVE DISTURBANCES AND IMPACTS FROM SKID TRAILS BE KEPT TO A MINIMUM IN BLOCKS WITH DOMESTIC STREAMS, NO TRACTORS LARGER THAN A D-7 SHALL BE ALLOWED IN BLOCKS 5 AND 6. NO EQUIPMENT SHALL OPERATE IN THESE BLOCKS UNLESS SOILS ARE "DRY".

WATER QUALITY 2) THE NEW LOCAL ROAD BETWEEN BLOCKS 6 AND 7 SHALL BE LIMITED TO 12 FEET IN WIDTH FOR THE SECTION BETWEEN THE LANDING ON BLOCK 6 AND THE CONNECTION WITH THE OLD ROAD ALIGNMENT. THIS ROAD SHOULD BE CLOSED IMMEDIATELY AFTER THE COMPLETION OF MANAGEMENT ACTIVITIES OR BEFORE THE END OF THE NORMAL LOGGING SEASON, WHICHEVER COMES FIRST.

WILDLIFE/ENDANGERED SP. 1) BECAUSE OF THE DETECTIONS OF MURRELETS AT TWO SURVEY SITES (BHG3 AND BHG 19) DURING THE SECOND YEAR OF SURVEY AN ADDITIONAL YEAR OF OCCUPANCY SURVEYS WILL BE CONDUCTED AT THOSE TWO SITES ONLY. (THE BE STATED THAT A SINGLE YEAR OF ADDITIONAL SURVEY IS BELIEVED TO BE ADEQUATE FOR THESE TWO SITES UNLESS OCCUPANCY IS CONFIRMED, SINCE THE 1994 SURVEYS WERE CONDUCTED AT A LEVEL WHICH SHOULD HAVE CONFIRMED OCCUPANCY. THE USFWS MAY OR MAY NOT CONCUR WITH THIS LEVEL OF ADDITIONAL SURVEY IN THEIR BIOLOGICAL OPINION.) SEASONAL RESTRICTIONS WILL BE REQUIRED FROM APRIL 1 TO AUGUST 5 FOR ALL DISTURBANCE ACTIVITIES, OTHER THAN HAULING ON EXISTING ROADS, FOR ANY ACTIVITY WHICH WOULD JEOPARDIZE THE VALIDITY OF THE SURVEYS. THIS WILL INCLUDE HARVEST UNITS B, 15, 16 AND 22 AND THE CONSTRUCTION OF THE SPUR ROAD TO UNIT 22.

WILDLIFE/ENDANGERED SP. 2) SEASONAL RESTRICTIONS WITHIN 0.75 MILE LINE OF SIGHT OR 0.5 MILE OUT OF SIGHT WILL

BE IMPOSED FOR ALL DISTURBANCE ACTIVITIES OTHER THAN TRAFFIC ON EXISTING ROADS, BETWEEN FEBRUARY 1 AND JULY 31 EACH YEAR. THIS WILL INCLUDE ACTIVITIES IN HARVEST UNITS B, 15, AND 16.

WILDLIFE/ENDANGERED SP. 3) SURVEYS FOR ALL THREATENED AND ENDANGERED SPECIES EXPECTED TO OCCUR WILL BE COMPLETED TO USFWS ACCEPTED PROTOCOL, IN APPROPRIATE HABITAT, PRIOR TO RELEASING A UNIT FOR HARVEST.

WILDLIFE/ENDANGERED SP. 4) SEASONAL RESTRICTIONS WILL APPLY TO ALL LOGGING, SITE PREP, STAND IMPROVEMENT, BURNING, ROAD CONSTRUCTION OR RECONSTRUCTION AND WATERSHED RESTORATION PROJECTS WITHIN 0.25 MILES OF ANY KNOWN OWL PAIR AT LEAST UNTIL NESTING STATUS IS DETERMINED FROM FEBRUARY 1, UNTIL JULY 31.

WILDLIFE/ENDANGERED SP. 5) THE STANDARD PRACTICES MUST BE IMPLEMENTED AS DESCRIBED ABOVE FOR EACH SILVICULTURAL PRESCRIPTION FOR ALL HARVEST UNITS. IF FOR SOME REASON DEVIATIONS MUST BE MADE ON A UNIT BY UNIT BASES THEN CONSULT THE WILDLIFE BIOLOGIST OR FOREST MANAGER SINCE THEIR NAMES ARE ASSOCIATED WITH THE BIOLOGICAL EVALUATION WHICH STATES THAT THESE PRACTICES WILL BE IMPLEMENTED.

Impacts to the following resource areas were determined not to be significant, based on analysis of impacts to these resources documented in these appendices to the EA:

- effects to archaeological resources (other than as noted above) - appendix A
- effects to visual resources - appendix B
- impacts to wild and scenic river - Appendix B
- socio-economics of proposed action - appendix D

- effects of road reconstruction and construction, and right-of-way - appendix E
- effects of potential and prescribed fire to tribal timberlands and adjoining private lands - appendix F
- geological effects of proposed action - appendix G
- effects of rock source development - appendix G
- cumulative impacts to soil and watershed resources - appendix G
- effects to wildlife from proposed action (other than as noted above) - appendix H
- effects to fisheries from proposed action - appendix I
- effects to botanical resources from proposed action - appendix K
- silviculture - appendix L
- impacts to soils - appendix M
- prairie management - appendix N
- tanker fill development - appendix O
- air quality effects from proposed action - appendix P
- timber growth and yield and management plan constraints - appendix Q

CONCLUSION

The Tribal Council has adopted by motion modified alternative 1, as described above and in the attached Environmental Assessment, as the preferred alternative for the FY 1995 timber sale program. Modified alternative 1 provides protection for tribal resources by following standards and guidelines for

resource management contained in the Hoopa Valley Indian Reservation Forest Management Plan, Volume 1, for the period 1994-2003. Mitigation measures in the FMP and the EA will be applied to any projects covered by the EA, so that any potentially significant impacts to the environment can be reduced to acceptable levels. In addition, the Council adopted stipulations regarding ROW, domestic water, and water storage for fire suppression.

The Tribe has initiated consultation pursuant to the Endangered Species Act with US Fish and Wildlife Service. No action will be taken until the Biological Opinion is rendered. The Tribe has also initiated consultation with the State Office of Historic Preservation regarding effects on cultural and archaeological resources. No action will be taken until the SHPO opinion is rendered, consistent with 36 CFR 800 and 25 USC 420.

/s/ Dale Risling Date 2/2/95

Dale Risling
Tribal Chairman
Hoopa Valley Tribe

(2)

Supreme Court, U.S.
FILED
JAN 2 3 2002
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No. 01-900

In the Supreme Court of the United States

ROBERTA BUGENIG,

Petitioner,

v.

HOOPA VALLEY TRIBE; THE HOOPA VALLEY TRIBAL COUNCIL; THE TRIBAL COURT OF THE HOOPA VALLEY TRIBAL RESERVATION; BYRON NELSON, JR., Honorable Judge of the Hoopa Valley Tribal Court; MERV GEORGE, Chairman of the Hoopa Valley Tribal Council,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CITIZENS EQUAL RIGHTS FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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29pp

QUESTIONS PRESENTED

The Ninth Circuit held that Congress granted to the Hoopa Valley Indian Tribe regulatory jurisdiction over fee simple property belonging to non-members (including non-Indians) when it enacted the Hoopa-Yurok Settlement Act of 1988, 25 U.S.C. § 1300i7.

1. When delegating regulatory jurisdiction over non-member owned fee simple property to an Indian tribe, must Congress describe that delegation in express and unambiguous language that refers to non-member owned fee simple property?

2. Does Congress have the authority to delegate regulatory jurisdiction over fee simple property belonging to a non-member to the Hoopa Valley Indian Tribe?

3. Does the delegation of broad legislative authority to the Hoopa Valley Tribe sanctioned by the Ninth Circuit violate the constitutional rights of non-members?

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INTEREST OF AMICUS CURIAE

The Amicus Curiae,[1] Citizens Equal Rights Foundation ("CERF") is a South Dakota non-profit corporation with members from a dozen states and numerous Indian reservation areas. The Board of Directors of CERF has both tribal and non-tribal members. CERF was formed to protect and support the constitutional rights of all people, to educate the public about their constitutional rights, and to participate in legal actions that adversely impact the constitutional rights of citizens. CERF is particularly concerned that the Indians and non-Indians who reside within the boundaries of original reservations are denied the full protection of the United States Constitution when reservation residents are made subject to the regulatory and adjudicative authority of tribal government. CERF has a critical interest in this case because it has members who own residential, recreational and commercial land and businesses within the boundaries of various Indian reservations in the United States. The actions of tribal governments, whether through regulatory or adjudicative authority, have impacted and have the potential to impact the property rights and the civil rights of United States citizens who are not members of tribal governments.

All parties have consented by written stipulation to the filing of this Amicus Brief.

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[1] Pursuant to Rule 37.6 of this Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than amicus curiae, their members or its counsel have made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The decision by the en banc panel of the Ninth Circuit Court of Appeals in Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201 (9th Cir. 2001) held that Congress, by ratifying and confirming the governing documents of the Hoopa Valley Tribe, delegated legislative jurisdiction to the Tribe over non-members and their fee land. Not only is this holding in violation of this Court's directive that any federal delegation of authority must be "express," South Dakota v. Bourland, 508 U.S. 679, 695 (1993) n. 15, but it is a broad delegation of legislative jurisdiction without standards and without constitutional protections.

CERF is gravely concerned that any Congressional affirmation of a tribe's constitution will now be viewed as a grant of federal legislative power to a tribe that will not only trump non-member property rights, but also pre-empt the state and local laws that until now have governed non-member fee lands within the boundaries of a reservation. Of even graver concern is the manner in which the Ninth Circuit disregarded the constitutional right of a non-member to be regulated only by a government in which a citizen can participate. While the Ninth Circuit found that Congress had delegated broad legislative authority over non-member fee lands to the Hoopa Valley Tribe, it did not require any principles to guide the application of delegated authority, nor did it mandate that the Hoopa Valley Tribe be subject to all the requirements of the United States Constitution in the exercise of that authority. For example, the Tribe was not required to allow non-members to participate in tribal government through suffrage and holding elective office. As Justice Souter's concurrence eloquently pointed out in Nevada v. Hicks, 533 U.S. 353, 121 S.Ct. 2304, 2323 (2001), constitutional guarantees do not have the same force and effect with regard to tribal government.

CERF respectfully requests that the Court review the Bugenig decision by the Ninth Circuit Court of Appeals. This Court should reverse, finding that Congress did not intend, by virtue of the Hoopa-Yurok Settlement Act of 1988, 25 U.S.C. § 1300i-7 ("Settlement Act"), to delegate to the Hoopa Valley Tribe jurisdiction over non-member fee land. If this Court should find an express delegation by Congress to the Hoopa Valley Tribe, it will be necessary to address complex and thorny issues as to the power, standards and conditions for such delegation. The Ninth Circuit's decision conflicts with numerous decisions of this Court requiring an "express" delegation of Congressional authority, Bourland and United States v. Mazurie, 419 U.S. 544 (1975), and further conflicts with what Congress intended when it "ratified and confirmed" the constitutions of states. Because the Constitution of the United States protects both the rights of its citizens and their property rights, this Court should hold that the "express" delegation doctrine of tribal jurisdiction over non-members must be as narrowly and carefully construed as the two exceptions to the main rule delineated in Montana v. United States, 450 U.S. 544 (1981). Strate v. A-1 Contractors, 520 U.S. 438 (1997); Atkinson Trading Co. v. Shirley, 121 S.Ct. 1833.

The Ninth Circuit has also strayed from the fundamental principles articulated by this Court in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), Montana and Strate which hold that tribal jurisdiction over non-members and non-member fee land is presumptively not present, and the exceptions are extraordinary. Underlying this doctrine is the recognition that the exercise of regulatory and adjudicatory authority by tribal governments over non-members and their fee lands is contrary to the very principles of representative government.

Finally, the decision by the Ninth Circuit Court of Appeals conflicts, in a fundamental way, with this Court's and the Eighth Circuit's decisions regarding the territorial extent of tribal jurisdiction. Put simply, tribal "territory" is not all lands within the boundaries of a reservation, only tribal lands, and it is this territorial restriction that severely limits tribal jurisdiction over non-member fee lands. Atkinson, 121 S.Ct. at 1832, 1833 [a "territorial restriction on tribal power" from their "dependent status" bars jurisdiction over "non-Indian fee land."] *See*, Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010, 1022 (8th Cir. 1999), *cert. denied* 120 S.Ct. 2717 (2000) *citing* Solem v. Bartlett, 465 U.S. 463 (1984) [Lands to which the Indians did not have any property rights were never considered Indian country.]

Bugenig, by looking at the percentage of non-member fee land ownership as a factor to be considered in determining the delegation of federal jurisdiction to the Hoopa Valley Tribe to regulate non-member fee land, simply ignores this Court's express rejection of that approach in Atkinson. "Irrespective of the percentage of non-Indian fee land within a reservation" the exceptions to tribal jurisdiction are narrowly construed. Id., 121 S.Ct. 1834-35.

ARGUMENT

I. BECAUSE OF THE IMPACT ON NON-MEMBER PROPERTY RIGHTS, CONGRESSIONAL DELEGATION OF AUTHORITY TO A TRIBE MUST BE EXPRESS AND UNAMBIGUOUS.

> Government is instituted no less for protection of the property, than of persons, of individuals. The one as well as the other, therefore, may be considered as

> represented by those who are charged with the government. . .
>
> The rights of property are committed into the same hands with personal rights.

The Federalist No. 54 (Hamilton or Madison) (Robert M. Hutchins ed., pp. 170-172).

The founders of the American republic recognized that to secure freedom, the Constitution must protect both the civil rights and the property rights of citizens. This judgment stemmed not from the base motive of protecting the wealth of its authors, but rather from the fundamental recognition that the protection of property rights was necessary to secure the rights of freedom. Walter Lippmann articulated this doctrine:

> [T]he only dependable foundation of personal liberty is the personal economic security of private property.
>
> The teaching of history is very certain on this point. It was in the medieval doctrine that to kings belong authority, but to private persons, property, that the way was discovered to limit the authority of the king and to promote the liberties of the subject. Private property was the original source of freedom. It is still its main bulwark.

Walter Lippmann, *The Method of Freedom*, pp. 100-101 (1934), *cited in* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1175, n. 8 (C.A. Fed. 1994).

Because private property is the foundation of American freedom, it is anathema to the principles that underlie the Constitution to subject non-member fee lands to jurisdiction by a tribal government in which the non-member owner cannot participate. The Fifth Amendment to the

United States Constitution requires due process of law before property rights can be taken. The Fourteenth Amendment protects those rights against any state action that would deprive a person of property without due process of law, or deny any person within its jurisdiction the equal protection of the laws. Allowing tribal governments to have broad powers over non-members violates these fundamental protections.

Accordingly, this Court has been increasingly protective of the rights of non-members, holding that non-member fee lands are not subject to tribal regulatory or adjudicative authority except in extremely limited circumstances:

> Hitherto, the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under Montana the extension of tribal civil authority over non-members on non-Indian land. (citations omitted).

Hicks, 121 S.Ct. at 2310. Amicus curiae submit that the same principles that led this Court to conclude that Montana's two exceptions are narrowly construed must also guide the analysis of whether Congress intended to make an **express** delegation of its authority to a tribe.

The Ninth Circuit's finding that Congress delegated authority to a tribe to regulate non-member fee lands runs counter to the Congressional policies that established non-member fee land ownership within reservations. Bugenig presumes that fee lands within a reservation are still part of a tribe's "territory." However, both the Eighth Circuit Court of Appeals and this Court have reached the opposite conclusion:

> At the turn of the century, Indian lands were defined to include "only those lands which the Indians held some form of property interest: trust lands, individual allotments, and to a more limited degree, opened lands that had not yet been claimed by non-Indians" Solem, 465 U.S. at 468. Lands to which the Indians did not have any property rights were never considered Indian Country.

Gaffey, 188 F.3d at 1022 [*citing* Solem].

The Ninth Circuit in Bugenig also found percentage of ownership to be a factor that the Court should consider in determining whether Congress had made an **express** delegation of authority to the Hoopa Valley Tribe. Id. 266 F.3d 1222. [*citing* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 441 (1989) (Stevens, J.) (plurality opinion).] In Atkinson, however, this Court rejected that interpretation. Id., 121 S. Ct. at 1834-35. Instead, Atkinson made very clear that when Congress conferred upon Indian tribes jurisdiction over certain criminal acts occurring in "Indian Country" in 18 U.S.C. §1151, that definition of "Indian Country" did not expand a tribe's sovereignty over non-members on non-Indian fee land. Atkinson, 121 S.Ct. 1832, n. 5.

> Only full territorial sovereigns enjoy the "power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens," and Indian tribes "can no longer be described as sovereigns in this sense."

Id., *citing* Duro v. Reina, 495 U.S. 676, 685 (1990).

The Court went on to reiterate the purposes behind the Indian General Allotment Act as recognized by Montana:

> It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

Atkinson, 121 S.Ct. 1830, n. 1, *citing* Montana, 450 U.S. at 560, n. 9.

The Court in Atkinson recognized that ninety million acres of non-Indian fee land had been acquired as part of the General Allotment Act [Dawes Act], 24 Stat. 388, as amended, 25 U.S.C. §331, et seq. Id. As to these non-Indian fee lands, the Congressional purpose was absolutely certain:

> The objectives of allotment were simple and clear-cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large. . .Section 6 [of the Dawes Act specified] that "each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside." 24 Stat. 390. [With the passage of the Indian Reorganization Act] Congress made no attempt to undo the dramatic effects of the allotment years on the ownership of former Indian lands. It neither imposed restraints upon the ability of Indian allottees to alienate or encumber their fee patented lands nor impaired the rights of those non-Indians who had

acquired title to over 2/3 of the Indian lands allotted under the Dawes Act.

County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251, 254-56 (1992).

The Report of the Commissioner of Indian Affairs, September 21, 1887, stated:

> After patents have been delivered, the laws of descent and partition of the State or territory in which the lands are located shall apply to said lands. . .
>
> After receiving his patent every allottee shall have the benefit of and be subject to the civil and criminal laws of the State or Territory in which he may reside; and no territory shall deny any Indian equal protection of law. (Id, at pages 3-4, *citing* Dawes Act.)

Henry Dawes himself made the following comment regarding the General Allotment Act:

> "I am responsible to the laws of Massachusetts alone; and so is each one of those Indians, henceforth, responsible alone to the laws of the state in which he lives." Henry Dawes, "Proceedings of the Fifth Annual Meeting of the Lake Mohonk Conference of the Friends of the Indians," 1887, quoted in *Americanizing the American Indians* (Francis Paul Prucha ed., Lincoln: University of Nebraska Press, 1978) p. 105.

Given the federal government's policies behind the General Allotment Act, non-Indians who purchase lands within former reservations had no expectation that tribal

governments would have any role in regulating their land or activities on fee land. *See generally*, Gaffey, 188 F.3d 1022. The settled expectations of all parties were that non-members and their fee lands would be subject to the state and local governments who would exercise regulatory and taxing authority, the very governments that both non-members and Indians participated in through election and by holding office. *See*, Cass County, Minnesota v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 107-08 (1998). As this Court stated in Hicks:

> State sovereignty does not end at a reservation's border. Though tribes are often referred to as sovereign entities, it was long ago that the court departed from Chief Justice Marshall's view that the laws of [a state] can have no force within reservation boundaries. Worcester v. Georgia, 6 Pet. 515, 561 (1832), White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980). Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the state. Id. [citations omitted].

Under the General Allotment Act, the expectation was that even tribal members would be subject to state taxation and regulation for their activities on fee land owned by the tribal member on the original reservation. *See*, Cass County, *supra*. While Congress ended the allotment policy with the passage of the Indian Reorganization Act, 48 Stat. 984 (1934), Congress never sought to repudiate or undo the effects of the policy that had existed during those fifty years and which had so dramatically changed the nature of Indian reservation lands. *See*, County of Yakima, 502 U.S. at 254-56.

Given the firmly established Congressional policies that led to the creation of non-Indian owned fee lands within

reservations and settled expectations of all parties, this Court's precedents mandate that any delegation of authority to an Indian tribe to regulate non-Indian fee land must be **express**, i.e. absolutely unambiguous and certain as to Congressional intent. This strict requirement for finding an express delegation of authority is mandated by the same policy considerations that underlie the narrow reading this Court has required for the two exceptions to Montana's main rule.

II. CONGRESS DID NOT MAKE AN EXPRESS DELEGATION TO THE HOOPA VALLEY TRIBE OF REGULATORY POWER OVER NON-MEMBER FEE LAND.

The en banc panel of the Ninth Circuit found that Congress had delegated to the Hoopa Valley Tribe the power to regulate the conduct of non-Indians on non-Indian fee land based on this language in the Settlement Act:

> The existing govening [sic] documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are ratified and confirmed. Bugenig, 266 F.3d at 1207 (*citing* 25 U.S.C. §1300i-7).

The dispute leading the Settlement Act was a series of legal actions by the Hoopa Valley Tribe and the Yurok Indians. In order to resolve the disputes between these two different groups of Indians, Congress in the Settlement Act granted to the Hoopa Valley Tribe jurisdiction over the original portion of the reservation known as the Square, while the Yuroks were given jurisdictional power over the addition to the Square known as the Extension. Bugenig at 1207. The

Hoopa Valley Tribe had excluded the Yuroks from participating in its governing body, and from any benefit from sale of timber from the Square. Id. at 1206. It is not surprising, therefore, that Congress "ratified and confirmed" the governing documents of the Hoopa Valley Tribe and gave it jurisdiction over the Square to the exclusion of the Yuroks, just as Congress also gave the Yuroks control over the Extension to the exclusion of the Hoopas.

The Settlement Act is absolutely silent on any intent of Congress to deal with non-member fee lands in any manner, and there is no indication that Congress intended to delegate to the Hoopa Valley Tribe federal jurisdiction over non-member fee lands.

The evidence is quite to the contrary. For example, Congress provided that its partition of the reservation lands between the Hoopa and Yurok Indians was contingent upon the Hoopa Valley Tribe's adoption of a resolution (a) waiving any claim that the Tribe had against the United States from the Settlement Act and (b) consenting to the establishment of the Settlement Fund. Bugenig at 1207. To adopt the Ninth Circuit's reasoning, we must believe that Congress intended to grant authority to the Hoopa Valley Tribe to regulate non-member fee land only if the Hoopa Valley Tribe released any claims it had against the United States, i.e. that the United States traded its regulatory power over non-member fee land for the right not to be sued. Nothing in the Settlement Act bears out that remarkable position.

The Ninth Circuit en banc panel points to various expressions by the Supreme Court of the general proposition that Congress can delegate jurisdiction to an Indian tribe to regulate the conduct of non-Indians on non-Indian fee land that is within a reservation. Id. at 1210, *citing* Atkinson, 121 S.Ct. at 1830; Strate; South Dakota v. Bourland, 508 U.S. at

694-95 & n. 15; Brendale, 492 U.S. at 426; Montana, 450 U.S. at 564; and Mazurie, 419 U.S. at 553-54.

Despite the general proposition set forth in the above cases that Congress can make an **express** delegation of authority, only Mazurie concerns a delegation of authority that was upheld by this Court. Mazurie, however, dealt with a matter expressly within the provisions of the Indian Commerce Clause of the United States Constitution, Art. I, §8(3) since it concerned the sale of alcoholic beverages within the boundaries of a reservation that was directly impacting tribal members. Id. at 548, 557. Mazurie differs from this case in two important respects.

First, in Mazurie, the tribal ordinance required that every liquor store within the Wind River Reservation obtain a tribal liquor license. Id. at 548. A federal statute prohibited the introduction of alcoholic beverages into "Indian Country" as defined by 18 U.S.C. §1161 unless it was done in conformity with both state law and an ordinance adopted by the Tribe. Mazurie at 547. At issue in Mazurie was a federal statute that had a blanket prohibition on the sale of alcoholic beverages within Indian Country unless the Indian tribe created an exception. Put simply, this was a very narrow delegation of authority to an Indian tribe to create an exception to federal law, unlike Bugenig where the Ninth Circuit found a broad delegation of legislative authority to regulate non-member fee lands.

Second, in Mazurie the defendant was arrested and prosecuted by federal officers under federal law in federal district court, a far cry from the tribal processes in Bugenig which do not provide the same constitutional protections. *See*, Hicks, 121 S.Ct. at 2323 (J. Souter concurring).

Mazurie sanctioned as permissible only an extremely limited delegation of authority, and it relied upon well established Congressional power under the Indian Commerce

Clause to regulate alcohol sales in Indian Country. Id. at 554-55. The Ninth Circuit's reliance upon Mazurie as authority for a grant of broad legislative and adjudicative jurisdiction, which federalized the enactments of the Hoopa Valley Tribal Council, is without support in this Court's findings. Under the circumstances present in Bugenig, this Court should insist upon an **express** delegation of authority, in which Congressional intent is absolute and unqualified, before it finds that Congress intended such a result by "ratifying and confirming" the governing documents of the Hoopa Valley Tribe.[2]

III. ANY DELEGATION OF REGULATORY AUTHORITY TO AN INDIAN TRIBE MUST BE BOTH EXPRESS AND NARROWLY GRANTED TO AVOID EXCEEDING CONGRESSIONAL POWER AND VIOLATING THE CONSTITUTIONAL RIGHTS OF NON-MEMBERS.

The Ninth Circuit in Bugenig approved a delegation of general legislative authority over non-member fee lands, in which the limitation on the tribe's exercise of delegated

---

[2] The concept that by ratifying and confirming the governing documents of the Hoopa Valley Tribe that Congress federalized all action taken by the Hoopa Valley Tribe under those documents is simply contrary to both Congressional intent and this Court's decisions. For example, while the Idaho Statehood Act, admitting Idaho into the Union, Act of July 3, 1890, ch. 656, 26 Stat. 215 "accepted, ratified and confirmed" the Idaho Constitution, this Court did not hold that Congress had delegated its authority to Idaho to legislate on behalf of Congress. *See*, Idaho v. United States, 533 U.S. 262, 334 (2001). If so, Idaho could have plenary jurisdiction over Indian tribes.

Congressional authority is not constrained by the Montana exceptions. Bugenig, 266 F.3d at 1223, n. 12. The Ninth Circuit found that although there are "limits on the authority of Congress to delegate its legislative power" those limits are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." Id. at 1222, *citing* Mazurie, 419 U.S. at 556-57. The problem with this analysis, of course, is that this Court has repeatedly stressed that Indian tribes lack independent authority over this particular subject matter, non-member fee lands. Bourland, 508 U.S. at 691, n. 11 and 695, n. 15 (the loss of power to exclude carries with it the loss of tribal regulatory authority; the source of tribal authority over non-members is not inherent, and cannot be inherent because of the dependent status of tribes); Hicks, 121 S.Ct. at 2310 (the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction.)

The Bugenig court further attempts to justify its decision, given the impact upon the constitutional rights of non-members who are excluded from participation in tribal government, because (1) of the existence of the Indian Civil Rights Act, 25 U.S.C. §1302, which applies some constitutional prohibitions to tribal government and (2) the tribal ordinance had to be approved by the Secretary of the Interior. Id. at 1223. Concerning the second point, having an ordinance approved by the Secretary of the Interior when that department is charged with the trust relationship that the United States government has with Indian tribes is not an independent forum for the vindication of non-members' constitutional rights. Furthermore, no "intelligible principles" guide the Department of Interior because the approval process by the Department is set forth in the Hoopa Valley Tribe's governings documents, not the Settlement Act. The Ninth Circuit bootstraps the executive branch approval

protection not from a Congressional scheme in the Settlement Act, but from the tribe's own documents. Id. at 1215.

With regard to the Indian Civil Rights Act, the only cause of action it provides (except for a habeas corpus action) is in tribal court. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). As Justice Souter pointed out in his concurring opinion to Nevada v. Hicks, tribes and tribal courts are not constrained in the application or interpretation of constitutional protections. *See,* Santa Clara Pueblo, 436 U.S. at 63 [Indian Civil Rights Act "does not prohibit the establishment of religion, nor . . . require jury trials in civil cases."] Since nothing in the Indian Civil Rights Act mandates such fundamental protections as separation of powers and the right to participate in representative government, non-member land owners are denied "the political franchise of voting" which is the "fundamental political right... preservative of all rights." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). The Ninth Circuit's opinion is silent on this issue.

The essence of the American representative system of government is that the people of the United States are the sovereign, and the people have the power to create the Constitution that controls the sovereign powers and governmental powers delegated by the people to the federal government. *See,* John R. Tucker, *The Constitution of the United States: A Critical Discussion of its Genesis, Development and Interpretation* (Henry St. George Tucker ed., Fred B. Rothman & Co. 2000) (1899), vol. 1, p. 62. The doctrine was stated by Justice Matthews in Yick Wo as follows:

> Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies

> of the government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.

118 U.S. 356, 370 (1886).

The Declaration of Independence, ¶2, established the "self-evident" truth that the just powers of government over its citizens are derived only from the consent of the governed, a consent conditioned on the right of those citizens to participate in that government through the right of suffrage and holding elective office. The fundamental rights of United States citizens are violated when tribal governments can regulate the activities of non-members on their fee lands, but exclude those citizens from participating in tribal government.

To avoid these conflicts, this Court has carefully limited tribal governments to the exercise only of internal sovereignty powers. The ultimate sovereign, the people of the United States, cannot be made subject to regulation by tribal governments which do not, and cannot by their nature, provide non-members the fundamental rights guaranteed to the people of the United States by the United States Constitution. *Compare*, Oliphant, 435 U.S. at 210. This principle must be considered when determining whether Congress properly and expressly delegated regulatory authority to an Indian tribe over non-member fee lands. While it has "plenary" power over Indian tribes, Congress does not have plenary power over United States citizens. The entire structure of the United States Constitution, including the Tenth Amendment, makes this point quite clear.

Mazurie held that there are "limits" on the authority of Congress to delegate power to an Indian tribe. Id. at 556. No case, except Bugenig, stands for the proposition that Congress can delegate to an Indian tribe general legislative

authority over non-member fee lands. A permissible delegation must be express and accompanied by "intelligible principles" and a narrow grant of a specific power. Panama Refining Co. v. Ryan, 293 U.S. 388, 464 (1935) ["there are limits of delegation which there is no constitutional authority to transcend."] Mazurie contained a permissible delegation because Congress prohibited the sale of alcohol and allowed the tribe to create the exception. Bugenig's grant of broad legislative jurisdiction without principles to guide the exercise of the delegated power leaves the non-member landowner without a voice in government or an independent forum for redress. The guarantee in Article IV, §4 of the Constitution of a republican form of government in each state, and the guarantee in Article IV, §2 that the citizens of each state shall be entitled to all of the privileges and immunities of the citizens in the several states, would be denied those California citizens who resided upon fee lands in the Hoopa Valley Reservation.

When this Court has approved the delegation of Congressional authority, whether to an Indian tribe in Mazurie or to the agencies of federal government, the court did so in a context in which the basic regulatory framework was established by Congress. In Touby v. United States, 500 U.S. 160 (1991), for example, Congress established general criteria that prohibited the sale of controlled substances and allowed the Attorney General to add or remove substances from the schedule of controlled substances. This is very similar to the approved scheme of delegated authority to an Indian tribe in Mazurie. This Court's standards on delegation require that Congress set down an "intelligible principle" to which the agencies must conform. J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928) and Mistretta v. United States, 488 U.S. 361 (1989).

This Court struck down a delegation of authority under Massachusetts law that allowed churches to veto licenses for liquor stores within five hundred feet of their church in Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982). Larkin held that this delegated authority violated the Establishment Clause of the First Amendment. The Ninth Circuit in Bugenig nevertheless allowed for delegated authority in order to protect the "spiritual health of the tribe," Id. at 1222, without any "effective means of guaranteeing 'that the delegated power' will be used for secular, neutral, and nonideological purposes." Larkin at 125 [citation omitted].

The source of the Congressional authority allegedly delegated in Bugenig is weak at best, since the record establishes that Roberta Bugenig was not engaged in commerce with the Hoopa Valley Tribe, leaving only the geographical location of her land within the boundaries of a reservation as the source of Congressional power. Bugenig at 1218-22. Congress, through the General Allotment Act, intended to sever reservation fee lands from tribal jurisdiction and place those lands under the jurisdiction of state authority. County of Yakima, 502 U.S. at 254-56. Congressional authority is dependent upon either the treaty making power or Indian Commerce Clause. Since no treaty is involved, and no commerce is occurring between Roberta Bugenig and the Hoopa Valley Tribe, the jurisdiction of Congress is at best minimal. Accordingly, the source of the power delegated is insufficient to support the broad grant of general legislative jurisdiction to the Hoopa Valley Tribe.

Turning to state law, the Ninth Circuit finds no inconsistency in having both state law and federalized tribal law apply to fee lands on a reservation. The Ninth Circuit failed to complete that analysis and consider what occurs when there is a conflict between state law and federalized

tribal law. Because the Bugenig analysis holds that tribal ordinances are enacted pursuant to delegated federal authority, and have the force of federal law, presumably tribal ordinances would preempt inconsistent state laws. Federalized tribal law could command a non-member to do acts prohibited by state law. Since Article I, §1 of the Constitution vests "all legislative Powers" in the Congress of the United States, this delegation of general legislative authority to an Indian tribe turns federalism, including the Tenth Amendment, on its head.

Because of the myriad constitutional questions raised by the decision in Bugenig, this Court should reverse the Ninth Circuit's holding that there was an express delegation of authority by Congress in ratifying and confirming the governing documents of the Hoopa Valley Tribe.

CONCLUSION

The petition for writ of certiorari should be granted.

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In The

Supreme Court of the United States

ROBERTA BUGENING,

Petitioner,

v.

HOOPA VALLEY TRIBE; THE HOOPA VALLEY TRIBAL COUNCIL; THE TRIBAL COURT OF THE HOOPA VALLEY TRIBAL RESERVATION; BYRON NELSON, JR., Honorable Judge of the Hoopa Valley Tribal Court; MERV GEORGE, Chairman of the Hoopa Valley Tribal Council,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE STATES OF IDAHO, ALABAMA, ALASKA, FLORIDA, INDIANA, NEW MEXICO, NEVADA, NORTH DAKOTA, OKLAHOMA, SOUTH DAKOTA, UTAH AND WYOMING IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

The States of Idaho, *et al.*, respectfully submit through their respective Attorneys General a brief amicus curiae pursuant to S. Ct. R. 37.4 in support of petitioner.

STATEMENT OF AMICI CURIAE STATES' INTERESTS

Perhaps the most sensitive issue in Indian law is the extent to which a tribe may exercise governmental authority over persons who are not its members. This Court has addressed that issue repeatedly over the last twenty-five years.[1] However, those cases dealt with whether a tribe's retained *inherent* authority provided a basis for the authority claimed. The petition here presents the issue in the context of a claimed "delegation" of

[1] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (criminal jurisdiction over non-Indian); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (taxation of nonmembers); *Montana v. United States*, 450 U.S. 544 (1980) (regulation of nonmember hunting and fishing); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (taxation of nonmember); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (zoning authority over nonmember-owned land); *Duro v. Reina*, 495 U.S. 676 (1990) (criminal jurisdiction over nonmember Indian); *South Dakota v. Bourland*, 508 U.S. 679 (1993) (regulation of non-Indian hunting and fishing); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (tribal court civil jurisdiction over nonmember defendant); *Atkinson Trading Co. v. Shirley*, 121 S. Ct. 1825 (2001) (taxation of nonmembers); *Nevada v. Hicks*, 121 S. Ct. 2304 (2001) (tribal court civil jurisdiction over nonmember state fish and game personnel).

federal authority to a tribe to regulate nonmember conduct. While the source of the power asserted by respondents does not originate with the involved tribe, the sensitivity is not lessened because, in either instance, that power is exerted over persons who "are excluded from participation in tribal government" (*Merrion v. Jicarilla Apache Indian Tribe*, 455 U.S. at 173 (Stevens, J., dissenting)) and thus "have not given the consent of the governed that provides a fundamental basis for power within our constitutional system" (*Duro v. Reina*, 495 U.S. at 694).

The amici curiae States do not dispute the abstract principle that Congress may delegate federal authority to tribes. This Court recognized that power in *United States v. Wheeler*, 435 U.S. 313, 326-29 (1978), and reiterated in *Montana v. United States*, 450 U.S. at 564, that "an express congressional delegation" can confer regulatory authority over nonmembers when inherent authority is absent. *See South Dakota v. Bourland*, 508 U.S. at 695 n.15 ("after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation[ ]' . . . and is therefore *not* inherent"). The Court nonetheless has never found a congressional delegation that authorizes the enforcement of the delegated power in a tribal forum. *Duro*, 495 U.S. at 694 (observing that, although *United States v. Mazurie*, 419 U.S. 544 (1975), "approved delegation to an Indian tribe to promulgate rules that may be enforced by criminal sanction in *federal* court, . . . no delegation of authority to date included the power to punish non-members in *tribal* court").

The requirement that the delegation be express reflects certain of the concerns discussed by Justice Souter in his recent concurring opinion in *Nevada v. Hicks*, *supra*, with respect to subjecting nonmembers to tribal

court jurisdiction; i.e., "an overriding concern that citizens who are not tribal members be 'protected . . . from unwarranted intrusions on their personal liberty,' " and the fact that "there is no effective review mechanism in place to police tribal courts' decisions on matters of non-tribal law, since tribal-court judgments based on state or federal law can be neither removed nor appealed to state or federal courts." 121 S. Ct. at 2323. Those concerns are singularly relevant where, at least as found by the Ninth Circuit below, a tribe has been "delegated" broad discretion to make and enforce *federal* law. Even if one assumes Congress' authority to enact that type of delegation, its intent to do so must be unmistakably clear to give *Montana*'s use of the term "express" its natural meaning. *Cf. County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 258 (1991) ("our cases reveal a consistent practice of declining to find that Congress has authorized state taxation [of tribal members] unless it has 'made its intention to do so unmistakably clear' ").

The amici States have a strong interest in plenary review of this controversy not only to secure guidance with respect to proper application of the "express delegation" standard generally but also for two reasons related to their sovereign status. *First*, according to the Ninth Circuit, respondent Hoopa Valley Tribe's regulations have "the force of [federal] law" (Pet. App. A-19) by virtue of the congressional delegation deemed embedded in section 8 of the Hoopa-Yurok Settlement Act ("Settlement Act"), Pub. L. No. 100-580, 102 Stat. 2924 (1988) (codified at 25 U.S.C. § 1300i). Conflicting state law therefore will be preempted. Although the ramifications of "federalizing" tribal law and thereby creating a new species of sovereign are thus extraordinary, they were given

no consideration by the court of appeals. *Second*, the Ninth Circuit concluded that under this Court's *Mazurie* opinion Congress may delegate any authority that it otherwise possesses under the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3. Pet. App. A-36 n.12. The "delegation" upheld in *Mazurie*, however, differs materially from that found here, and the court of appeals did not examine those differences or their effect on Congress' authority to delegate broad federal authority to an extra-constitutional entity. Such an examination is important to the amici States because, even in the absence of their laws being preempted by federalization of a tribe's internal law, expansive delegations will lead to concurrent tribal authority over many activities that the tribe could not otherwise regulate or adjudicate. Some measure of overlapping jurisdiction may be inevitable within Indian country, *see Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), but States have a substantial interest in regulatory or other legal burdens being as consistent as possible for all residents.

The petition presents two questions, and they go to the heart of the amici States' concerns: Whether the Ninth Circuit correctly understood and applied the "express congressional delegation" standard adopted in *Montana*, and, if so, whether Congress has authority to "federalize" a tribal constitution and regulations. These questions raise core Indian law and constitutional issues that should be decided by this Court.

STATEMENT

This litigation arose from a tribal-court action brought by the Hoopa Valley Tribe against a nonmember

landowner to enforce a 1995 tribal regulation that proscribes logging activity within a one-half mile radius of a ceremonial site on the Tribe's reservation. Pet. App. J. The nonmember purchased the affected property shortly after the regulation's adoption. The tribal courts enjoined the nonmember from further logging within the "buffer zone." Pet. Apps. F, G. The nonmember thereafter filed suit in federal district court to challenge the Tribe's regulatory authority. The district court rejected the challenge. Pet. App. D. It concluded that Congress delegated to the Tribe federal authority under the Settlement Act to regulate nonmembers within the reservation. Pet. App. D-8. A Ninth Circuit three-judge panel reversed (Pet. App. C), but the panel decision was vacated and rehearing *en banc* granted (Pet. App. B). The *en banc* panel affirmed the district court, with three judges dissenting. Pet. App. A.

The en banc majority, like the district court, relied upon the Settlement Act for its holding. That statute was enacted to resolve a controversy over governance of the Hoopa Valley Reservation as established by executive order in 1876 and modified fifteen years later by another executive order. The 1876 reservation ("the Square") consisted of a square with twelve-mile sides; the 1891 modification added a two-mile wide strip of land ("the Extension" or "the Addition") from the Square to the Pacific Ocean along the Klamath River. The 1876 executive order did not specify any tribe on whose behalf the reservation was set aside. Several tribes inhabited the area, the largest of which is the federally acknowledged Hoopa Valley Tribe. The Department of the Interior ("Department") eventually concluded that the Square had been set aside for the Hoopa Valley Tribe and that the substantial income derived from logging activity accrued

to its members' sole benefit. *See, e.g., Rights of Indians in the Hoopa Valley Reservation, California,* 65 Interior Dec. 59 (1958).

The Department's administrative practice sparked litigation before the Court of Claims by other Indians residing on the reservation, who identified themselves as Yuroks, then not a federally acknowledged tribe. These Indians lived for the most part in the Extension, and their challenge proved successful. *Short v. United States,* 486 F.2d 561, 566 (Ct. Cl. 1973) (holding that the 1891 executive order "is to be given its natural effect of granting to the Indians of the Addition, as Indians of the enlarged reservation, rights to the reservation equally with Indians of the Square"). The decision in *Short* provided the basis for a later ruling requiring the Federal Government to "run the reservation for the use and benefit of all [resident Indians], not for the benefit of some to the clear detriment of others" (*Puzz v. United States,* No. C80-2908 TEH, 1988 WL 188462, at *9 (N.D. Cal. Apr. 8, 1988)) and limiting the Hoopa Valley Tribe's sovereignty to "its own members[ ] and as an advisory body participating in reservation administration" (*id.,* at *10).

The *Puzz* decision served as the immediate catalyst for the Settlement Act. The Senate report accompanying the bill adopted as the Act characterized the district court's ruling to mean that "the reservation, as extended, was intended for the communal benefit of northern California Indian tribes and groups and that, absent statutory delegations, existing tribes lacked power to manage the resources [on the reservation]." S. Rep. No. 100-564, at 9 (1988). The Settlement Act, in part, (1) set aside the Square as a reservation for the Hoopa Valley Tribe and the Extension as a reservation for the Yurok Tribe, (2)

directed the Secretary of the Interior to develop membership rolls for the Tribes, (3) allowed individual Indians eligible for membership in the Tribes to decline such membership and receive a lump sum settlement payment, and (4) formally acknowledged the Yurok Tribe and created a procedure for formation of its government. Section 8 of the Settlement Act further stated that "[t]he existing govening [sic] documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed." 25 U.S.C. § 1300i-7. The Senate report explained that this section "preserves, ratifies, and confirms the existing status of the Hoopa Valley Tribe as a Federally-recognized tribe and reinstates full recognition of its governing documents and governing body as heretofore recognized by the Secretary" in 1972. S. Rep. No. 100-564, at 25; *see* Pet. App. A-16 n.4.

Against this backdrop, the Ninth Circuit concluded that "the plain text of the Settlement Act establishes that, when Congress 'ratified and confirmed' the Tribe's governing documents, it intended to give the Tribe's Constitution the force of law." Pet. App. A-19. It "buttressed" this construction by reference to the Senate report that, " 'absent statutory delegations,' the Hoopas could not manage the Square" and that "the ratification and confirmation of the Tribe's Constitution was exactly that: a 'statutory delegation[ ]' of authority to the Tribe to 'make management decisions relating to the lands and resources of the "Square." ' " *Id.* The court then turned to the Tribe's constitution and identified as relevant two provisions – Article III and Article IX, section (1)(*l*) – that were given the force of federal law by virtue of section 8. Consequently, "when the Tribe passed the ordinance, it

was acting pursuant to authority expressly granted by Congress." Pet. App. A-27; *see also* Pet. App. A-24 n.9.

The court of appeals next rejected petitioner's contention that Congress lacked the power to make this delegation of authority to the Tribe. It concluded initially that Congress *itself* could have adopted the buffer-zone regulation under the Indian Commerce Clause. Pet. App. A-35 (Congress may "prohibit a non-Indian from using such lands so as to put the spiritual health of a tribe at risk"). Having found congressional power, the court relied upon *Mazurie* for the proposition "that Congress can delegate to Indian tribes those powers that are within the sphere of the Indian Commerce Clause powers that are 'rationally related' to the protection of Indians." Pet. App. A-36 n.12.

ARGUMENT

I. THE NINTH CIRCUIT'S CONSTRUCTION OF THE TERM "RATIFIED AND CONFIRMED" IN SECTION 8 OF THE SETTLEMENT ACT RAISES A SUBSTANTIAL QUESTION OVER THE MEANING AND APPLICATION OF *MONTANA*'S "EXPRESS CONGRESSIONAL DELEGATION" STANDARD.

The Ninth Circuit did not dispute the proposition that the Settlement Act's overall objective was "to bring the Hoopa Valley Tribe and the Yurok Tribe within the mainstream of federal Indian law" (S. Rep. No. 100-564, at 2) by resolving "a long-standing controversy between the Hoopa Valley Tribe which is organized under constitutional provisions approved by the Secretary of the Interior and persons who are primarily, but not exclusively, of Yurok Indian descent" (*id.*, at 15). Section 8 of the Act

thus specifically refers to the "gove[r]ning documents" of the Hoopa Valley Tribe "as heretofore recognized by the Secretary." As the court of appeals noted, that recognition had occurred in the context of the Department's approval of the constitution in 1972, with territorial coverage limited to the Square. The most natural reading of Congress' action is that section 8 extended to the constitution the same status which it nominally had acquired at the time of the Secretary's 1972 approval – a status vitiated by the decisions in the *Short* and *Puzz* litigation. Congress simply intended, therefore, to restore the *status quo ante* with respect to the Hoopa Valley Tribe's governance rights in the Square.

The court of appeals did not suggest that the Hoopa Valley Tribe's constitution or any ordinances adopted pursuant to it would have carried "the force of [federal] law" prior to the Settlement Act had the *Short* and *Puzz* cases upheld the Tribe's sovereign primacy with respect to the Square. It is settled within the Ninth Circuit that tribal constitutions approved by the Secretary or ordinances adopted under them do not become "federal law" by virtue of such approval. *Boe v. Fort Belknap Indian Community*, 642 F.2d 276, 279 (9th Cir. 1981); *see also Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1077 (9th Cir. 1990); *Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1476 (9th Cir. 1989). That conclusion is also implicit in *Merrion v. Jicarilla Apache Tribe*, *supra*, where this Court upheld the inherent authority of an IRA-organized tribe to impose its oil and gas severance tax ordinance, which had been approved by the Secretary (*Merrion*, 455 U.S. at 136), on a nonmember producer, a determination that squarely conflicts with any contention that the ordinance had been transformed into "federal

law" through the approval. *See Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 199 (1985) ("Congress, in passing the IRA to advance tribal self-government, . . . did nothing to limit the established, pre-existing power of the Navajos to levy taxes"). Rather, as the Court made clear in its discussion of the Commerce Clause challenge to the Jicarilla Apache Tribe's tax, Secretarial approval was merely a congressionally established "checkpoint[ ] that must be cleared before [the] tribal tax [could] take effect." *Merrion*, 455 U.S. at 155. The approval, in other words, was a precondition to *implementation* of an ordinance that had been enacted pursuant to the tribe's retained authority.

The Ninth Circuit's reliance on *Antoine v. Washington*, 420 U.S. 194 (1975), as support for its conclusion that section 8 gave the tribal constitution "the force of [federal] law" is, if not wholly misplaced, at least very questionable. Pet. App. A-19-20. There, in the context of an agreement between the United States and a tribe ceding a portion of a reservation, this Court rejected the Washington Supreme Court's "distinction for purposes of the Supremacy Clause between the binding result upon the State of ratification of a contract by treaty effected pursuant to two-thirds of the Senate . . . and the binding result of ratification of a contract effected by legislation passed by the House and the Senate." 420 U.S. at 200-01. The Court pointed to several prior decisions as "sustain[ing] the ratified agreements as the exercise by Congress of its 'plenary power . . . to deal with the special problems of Indians (that) is drawn both explicitly and implicitly from the Constitution itself.' " *Id.* at 204. It therefore held that, "[o]nce ratified by Act of Congress, the provisions of the agreements became law, and like treaties, the supreme law of the land." *Id.*

Congressional ratification of a bilateral arrangement between the Federal Government and a tribe nonetheless presents a substantially different situation than removing a federal law barrier to the otherwise valid exercise of authority by another sovereign. So, for example, in the enabling act associated with the State of Wyoming's admission to the Union, Congress "approved, ratified, and confirmed" that State's constitution, but no plausible argument can be made that such ratification gave the constitution "the force of [federal] law." Act of July 10, 1889, 26 Stat. 222. The difference between these instances of ratification lies in the nature of what is being ratified and the purpose of the ratification. In first instance, Congress adopts the agreement and thereby confers upon it the status of a federal enactment; i.e., the very object of the "confirmation and ratification" is to make the parties' action Congress' own. In the second instance, Congress merely manifests acceptance of a unilateral action as valid for the particular purpose at hand – e.g., recognizing the formation of a State through the territory's adoption of a constitution and acceding to the State's admission to the Union. Indeed, this Court's recent decision in *Idaho v. United States*, 121 S. Ct. 2135 (2001), embodied both uses of the "confirmation and ratification" concept. On one hand, Congress " 'accepted, ratified, and confirmed' " two agreements entered into by the United States with the Coeur d'Alene Tribe adjusting the boundaries of the latter's executive order reservation (*id.* at 2141 (quoting Act of Mar. 3, 1891, §§ 19, 20, 26 Stat. 1027, 1029)), and, on the other, Congress " 'accepted, ratified, and confirmed' " the Idaho Constitution (*id.* (quoting Act of July 3, 1890, 26 Stat. 215)). One effect of ratifying and confirming the agreements was to deprive

Idaho of title to submerged lands underneath a portion of Lake Coeur d'Alene and the St. Joe River – an action which only Congress could take. *See* 121 S. Ct. at 2143 ("[w]e ask whether Congress intended to include land under navigable waters within the federal reservation and, if so, whether Congress intended to defeat the future State's title to the submerged lands").

Most reasonably construed, section 8 reflects the latter situation. The Ninth Circuit identified no reason why Congress would have desired to transform the Hoopa Constitution into an instrument of federal law, and several considerations quite specific to this controversy counsel against that construction. First, the court of appeals' conclusion can hardly be reconciled with congressional intent to bring the Tribe "within the mainstream of federal Indian law" where Secretarial approval does not "federalize" a tribal constitution but merely serves to satisfy a "checkpoint" requirement placed upon those tribes opting either to reorganize under IRA or to subject themselves to such a requirement voluntarily. Second, "federalizing" the tribal constitution would replace inherent tribal authority with federal power; i.e., the Tribe would become a federal actor since the only actions its governing council may take are those sanctioned by its constitution and therefore subject to, *inter alia*, federal constitutional constraints. Hoopa Const., arts. V, § 1 and IX. Thus, while the Hoopa Constitution sets out in *haec verba* the rights guaranteed under section 202 of the Indian Civil Rights Act, 25 U.S.C. § 1302 (Hoopa Const., art. VIII), among the constitutional rights not contained in section 202 and the constitution is a prohibition against the establishment of religion (*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63 (1978)) – a particularly significant

fact here given the objective of the buffer-zone ordinance to protect the Tribe's "most sacred spiritual location." Pet. App. F-23; *see, e.g., Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so' "). Last, since no provision comparable to section 8 exists for the Yurok Tribe, the equality of tribal status within their respective reservations that animated the Settlement Act as a whole would be compromised. *See* S. Rep. No. 100-564, at 1-2.

Because of the Ninth Circuit's reliance on section 8's perceived "plain text" (Pet. App. A-19) and the attendant failure to appreciate the difficulty attendant to its construction, that court did not address the standard to be applied in determining whether the necessary explicitness of delegation exists. This Court, however, has addressed a comparable issue in determining whether Congress has consented to state taxation of tribes or their members with respect to on-reservation activities or property and required that such consent be "unmistakably clear." *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. at 258. In *County of Yakima*, the Court held that a state *ad valorem* tax could be applied to real property owned by a tribe within its reservation, finding the requisite congressional authorization in section 6 of the General Allotment Act, 25 U.S.C. § 349, which not only subjected allottees, once fee title issued to them, to state law but also removed "all restrictions as to sale, incumbrance, or taxation" of the allotted land. It then *rejected* the claim that an excise tax assessed against the sale of land was authorized. Acknowledging

that "[i]t does not exceed the bounds of permissible construction to interpret 'taxation of land' as including taxation of the proceeds from sale of land," the Court characterized such reading as "surely not . . . the phrase's unambiguous meaning." 502 U.S. at 268. It reasoned that "[i]t is quite reasonable to say . . . that though the object of the *sale* here is land, that does not make the land the object of the *tax*, and hence does not invoke the [section 6] proviso." *Id.* at 268-69.

Here, as well, it may be appropriate to conclude in some situations that the words "ratified and confirmed" give the involved instrument "the force of [federal] law" when without such effect the very purpose of the ratification is defeated. The interpretative metric nevertheless changes where congressional delegation of power over nonmembers is involved, since Congress' expression of intent to delegate *that* power must be direct and not susceptible to reasonable dispute – i.e., "unmistakably clear" or "unambiguous." This Court should exercise its jurisdiction to articulate and apply the proper "express congressional delegation" standard.

II. THE NINTH CIRCUIT'S DELEGATION DETERMINATION RAISES A SUBSTANTIAL QUESTION OVER THE SCOPE OF CONGRESS' AUTHORITY TO DELEGATE FEDERAL POWER TO INDIAN TRIBES.

The Ninth Circuit upheld congressional authority to delegate authority over petitioner's activities with syllogistic reasoning: Because Congress has authority under the Indian Commerce Clause to regulate all land within a reservation, including that owned by nonmembers, and because Congress has authority to delegate any power it

possesses under that clause to an Indian tribe, the Hoopa Valley Tribe possesses delegated power to regulate petitioner's use of her property. The second proposition represents, in the amici curiae States' view, a substantial extension of current delegation principles as reflected in *Mazurie* and warrants this Court's review.

The breadth and nature of the authority "delegated" to the Tribe are the starting point for assessing the court of appeals' reliance on *Mazurie*. The Hoopa Constitution defines the powers possessed by the tribal council in expansive terms. Article IX, section 1(k) authorizes the council "[t]o promulgate and enforce ordinances governing the conduct of members and nonmembers of the Hoopa Valley Tribe," while the following subsection authorizes it to regulate "the conduct of trade and the use and disposition of property upon the reservation" for purposes of "safeguard[ing] the [Tribe's] peace, safety, morals and general welfare" with the limitation that any ordinance "directly affecting non-members" must be approved by the Commissioner of Indian Affairs or his designee. Pet. App. I-2. Accepting the Ninth Circuit's construction of section 8 in the Settlement Agreement necessarily means that Congress has imbued actions taken by the tribal council with "the force of [federal] law" and thereby conferred upon the council broad, discretionary legislative power to make such law.

The authority delegated in *Mazurie* differed greatly. In sustaining the conviction of two non-Indians for violation of 18 U.S.C. § 1154 for introduction of liquor into Indian country, this Court held 18 U.S.C. § 1161, which exempts from § 1154's prohibition liquor transactions in conformity with applicable state and tribal law, to constitute a permissible delegation. It analogized § 1161 to a

joint congressional resolution challenged in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). That resolution authorized the President to determine whether proscribing arms or munitions sales to countries engaged in a South American armed conflict " 'may contribute to the reestablishment of peace in those countries.' " *Id.* at 312. In finding the delegation valid, the Court relied on the President's constitutionally-grounded preeminence in foreign affairs. That primacy, it stated, distinguished the delegation in the joint resolution from one made in connection with "domestic affairs." *Id.* at 320 ("congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved").

The Court reasoned in *Mazurie* that tribes, as "unique aggregations possessing attributes of sovereignty over both members and their territory," similarly possess "independent tribal authority . . . quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority 'to regulate Commerce . . . with the Indian tribes.' " 419 U.S. at 557. Importantly, however, the "delegation" under § 1161 is limited to a discrete subject matter – the introduction of alcohol into a tribe's reservation – and can be enforced for federal law purposes solely in a criminal proceeding as a *defense* to a § 1154 prosecution. *See Duro v. Reina*, 495 U.S. at 694. Stated alternatively, *Mazurie* does not suggest that tribal liquor regulations become independently enforceable in federal court by virtue of § 1161; those regulations simply have been adopted by Congress as a potential limitation on federal criminal liability under § 1154. *Cf. United States*

v. Sharpnack, 355 U.S. 286, 295 (1958) (since Congress may enact criminal laws with respect to federal enclaves, "[i]t certainly may do so by drafting new laws or by copying laws defining the criminal offenses in force throughout the State in which the enclave is situated"). To extrapolate from *Mazurie* the conclusion that Congress may delegate any of its Indian Commerce Clause powers to a tribe is thus hazardous given the unusual nature of § 1161.

Crediting such an interpretation raises significant constitutional issues. As this Court observed in *Seminole Tribe v. Florida*, 517 U.S. 44, 62 (1997), "[i]f anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause." "Federalizing" the Hoopa Constitution means that Congress has transferred this expansive power not to carry out its substantive directions in a particular area but rather to legislate with virtually unfettered discretion across the general range of tribal governmental interests – a breadth of delegation the Court has never sanctioned in any context. It further means not only that tribal regulations will have the status of federal law for Supremacy Clause purposes and thereby permit the Hoopa Valley Tribe to supersede state law but also that, if the Ninth Circuit's reasoning is pursued to its logical end, the Tribe can "repeal" congressional enactments. *See, e.g., United States v. Sioux Nation*, 448 U.S. 371, 382 (1980) (ratification and confirmation of agreement "had the effect of abrogating the earlier Fort Laramie Treaty").

Moreover, the sole extrinsic check on the Tribe's lawmaking under its 1972 constitution currently is the need for approval of certain tribal council actions by Department officials, whose discretion in that regard is subject

to no discernable constraint. The Settlement Act, as interpreted by the Ninth Circuit, accordingly effects a delegation of Congress' broad Indian Commerce Clause authority to the Tribe that, in turn, has given to a federal administrative agency standardless veto power over some aspects of the delegated authority's exercise. Congress thereby effectively surrendered its legislative role to an Indian tribe and the Executive Branch. Reconciling this anomalous result with existing separation-of-power principles is plainly difficult. *See, e.g., Whitman v. American Trucking Ass'n*, 531 U.S. 457, 472 (2001) ("when Congress confers decisionmaking authority upon agencies, Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform' "); *Clinton v. City of New York*, 524 U.S. 417, 444 (1998) (holding presidential cancellation authority under the Line Veto Act invalid; "whenever the President cancels an item of new direct spending or a limited tax benefit he is rejecting the policy judgment made by Congress and relying on his own policy judgment").[2]

The amici States, in sum, are troubled deeply by the Ninth Circuit's conclusion that *Mazurie* stands for the principle that Congress may delegate to a tribe unconstrained authority to make federal law. Tribal sovereignty

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[2] That this Court relied in *Mazurie* upon the Secretarial certification and publication requirement in § 1161 as a protection against arbitrary tribal action does not dictate the absence of a potential delegation problem here. 419 U.S. at 558 n.12. The text of § 1161 suggests that the certification obligation is ministerial, but, in any event, the question of an improper delegation of authority to the *Secretary* was not addressed in *Mazurie*.

is not comparable to the Federal Government's or the States'. *Atkinson Trading Co. v. Shirley*, 121 S. Ct. at 1832 n.5 ("[o]nly full territorial sovereigns enjoy the 'power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens,' and Indian tribes 'can no longer be described as sovereigns in this sense' "); *cf. Nevada v. Hicks*, 121 S. Ct. at 2314 (the "historical and constitutional assumption of concurrent state-court jurisdiction over federal-law cases is completely missing with respect to tribal courts"). Tribes additionally function outside Bill of Rights or Fourteenth Amendment restraints, have immunity from suit absent waiver or congressional abrogation, and, if adjudicatory jurisdiction exists otherwise, may possess unreviewable authority to resolve federal law-controlled disputes. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 56, 58; *Hicks*, 121 S. Ct. at 2323 (Souter, J., concurring). Any affirmative grant of federal authority therefore should be narrowly circumscribed and accompanied, as in *Mazurie*, by substantial guarantees of constitutional and statutory protection in nontribal forums. *See Reid v. Covert*, 354 U.S. 1, 21 (1957) (plurality op.) (congressional power over land and naval forces under Article I, § 8, cl. 14, even when joined with Necessary and Proper Clause power, insufficient to save statute that authorized trial of nonmilitary United States citizens before military tribunal). Stated alternatively, if Congress employs tribes to carry out specific federal law objectives, not only should the power delegated be defined carefully and have a close fit to those objectives, but federal forum-based redress also should be made available. This is not to say that every delegation must parallel § 1161 by incorporating tribal law as an element of or a defense to a federal statute-based claim. It is to say

that Congress may not delegate to a tribe broad power to create positive federal law which binds individuals and usurps state authority; i.e., Congress may not fashion a "delegation run[ ] riot." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ROBERTA BUGENIG,

Petitioner,

v.

HOOPA VALLEY TRIBE; THE HOOPA VALLEY TRIBAL COUNCIL; THE TRIBAL COURT OF THE HOOPA VALLEY TRIBAL RESERVATION; BYRON NELSON, JR., Honorable Judge of the Hoopa Valley Tribal Court; MERV GEORGE, Chairman of the Hoopa Valley Tribal Council,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Should this Court exercise its discretion to review a decision of the circuit court, which read the plain language of a federal statute pertaining to only the Hoopa Valley Tribe to find congressional authorization of the Tribe's exercise of limited jurisdiction within the Tribe's reservation over the timber harvesting activities of a nonmember of the Tribe?

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STATEMENT OF THE CASE

This case involves reading the plain language of the congressionally approved governing document of the Hoopa Valley Tribe and a section of a federal statute pertaining specifically to that document. Resolution of the cases below required no more than reading the straightforward language of these documents and applying an accepted analytical framework to determine whether Congress delegated a particular governmental authority to the Tribe. Petitioner Roberta Bugenig, who seeks to log her property in contravention of law, invites this Court to resolve a nonexistent conflict in the law and to fashion an unprecedented and legally baseless standard to test all delegations of congressional authority to Indian tribes. For the reasons discussed below, her petition should be denied.

1. In 1994, as part of the process to adopt a timber management plan, the Hoopa Valley Tribe commenced a lengthy public process to prevent timber harvests from adversely affecting the White Deerskin Dance Trail. *See* Pet. App. G-5; Pet. App. F-11. The White Deerskin Dance Trail is considered to be an archeological site by anthropologists, historians and the local community.[1] The history and cultural importance of the White Deerskin Dance is detailed in the tribal supreme court opinion. Pet. App. F-3-8.

2. The Tribe proposed a no-cut buffer zone one-half mile on each side of the Dance Trail. Pet. App. G-1; Pet. App. F-11; Pet. App. D-3. The cultural resource impact avoidance studies and public hearings conducted in 1994-95 included written notice to the few private landowners having property on Bald

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1. *E.g.*, Stipulated Tribal Court Record, Tab 15 (November 21, 1995, letter of HRIS researcher), filed in district court docket No. 21.

Hill, including Petitioner's predecessor-in-interest. Pet. App. G-5; Pet. App. F-11. Upon conclusion of the public notice and comment period, the Tribe adopted the plan, including the buffer zone, in January 1995. Pet. App. G-1; Pet. App. F-14; Pet. App. D-3. The plan was then approved by the Bureau of Indian Affairs. Pet. App. A-23; *see also* Pet. App. F-13, 15.

3. In March 1995, Petitioner Roberta Bugenig purchased property on Bald Hill. Pet. App. F-15; Pet. App. D-3. Petitioner's property is among the less than one-percent of the Hoopa Valley Indian Reservation that is owned by non-Indians. Pet. App. A-6; Pet. App. G-1; Pet. App. F-11. Bugenig contacted the Humboldt County Planning Department and the California Department of Forestry (CDF) asserting that she was exempt from state timber harvesting plan requirements because her proposed logging involved less than three acres. *See* Pet. App. G-2-3; Pet. App. D-3. Based on that representation, CDF issued her a less-than-three-acre exemption. *Id.* However, Bugenig had already entered into a contract to cut, deliver and sell to a lumber mill all of the timber on her land, as well as that of an adjoining parcel. Pet. App. G-2-4.[2] CDF later revoked Bugenig's exemption stating "no timber operations are allowed on significant historical or archeological sites [defined as] sites that have significant or religious importance to California Indians." Pet. App. G-6; Pet. App. F-16-17; Pet. App. D-4; Pet. App. A-11. Knowing that the Hoopa

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2. The tribal trial court specifically found that the volume of timber Bugenig proposed to sell had to be harvested from all of Bugenig's 40 acres. Pet. App. G-4 (". . . the court has determined that amounts of timber to be harvested as mentioned by the defendant, including conifers and hardwood[,] could not have been harvested from a 2.5 acre site" as Bugenig indicated in her application to CDF).

Valley Tribe owned the nearby road,[3] Bugenig attempted to establish a right-of-way to haul her harvested logs on the tribal road by writing a check to the Tribal Council. Pet. App. G-5-6; Pet. App. F-16; Pet. App. D-3. Two days later, Bugenig began to harvest the timber on her land. Pet. App. G-6; Pet. App. F-16; Pet. App. D-3. The Tribal Council refused the payment and ordered her to cease cutting down trees in the buffer zone designed to protect the archeological area. Pet. App. G-4; Pet. App. F-16; Pet. App. D-3-4.

4. When Bugenig continued to harvest timber, the Tribe filed suit against her in tribal court. Pet. App. G-4; Pet. App. F-16; Pet. App. D-4. The Tribe obtained an injunction that required Bugenig to halt her timber harvest and to restore the damaged area to its original condition. Pet. App. G-8. That injunction was affirmed by the Northwest Regional Appeals Court, which is the supreme court of the Hoopa Valley Tribe. Pet. App. F-24. Both tribal courts referred to Congress's approval of the tribe's authority. Pet. App. F-24; *see also* Pet. App. G-4. Petitioner then filed suit in the U.S. District Court for the Northern District of California, which upheld the Tribe's exercise of authority because it determined that Congress had delegated certain authorities to the Tribe in section 8 of the Hoopa-Yurok Settlement Act of 1988, Pub. L. 100-580, 102 Stat. 2924 (codified at 25 U.S.C. §§ 1300i-1 through 1300i-11). Pet. App. D-9. Although a panel of the Ninth Circuit Court of Appeals reversed, Pet. App. C-26, upon rehearing, an

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3. Contrary to Petitioner's multiple misstatements, Pet. 1, 2, 3, the road adjacent to Bugenig's property is neither "public" nor a "highway, nor does the Dance Trail proceed "northward along a public highway." Pet. App. D-3. The hill is steep and wooded; a tribal road switchbacks up the hill. Stipulated Tribal Court Record, Tab 15 (three maps), filed in district court docket No. 21.

en banc panel of the Ninth Circuit affirmed the district court's decision. Pet. App. A-2. Petitioner then timely filed her petition for certiorari review by this Court.

REASONS FOR DENYING THE WRIT

1. The Circuit Court's Decision Involves Routine Construction of a Statute Affecting One Indian Tribe in California.

a. This Court has repeatedly said that where Congress has expressly authorized a tribe's exercise of civil authority over a nonmember, one need look no further to support the tribe's exercise of that authority. *E.g.*, *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 121 S. Ct. 1825, 1830 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997); *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 483, 483-84 (1999); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 428 (1989); *Montana v. United States*, 450 U.S. 544, 564 (1981); *Morris v. Hitchcock*, 194 U.S. 384, 393 (1904). In this case, the Hoopa Valley Tribe received such congressional authority.

Section 8 of the Settlement Act states that the "existing [governing] documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed." 25 U.S.C. § 1300i-7. That section gave the Tribe's 1972 constitution, an "existing [governing] document," the express authorization of Congress.[4]

4. Petitioner excerpts the wrong governing document, the Hoopa Valley Tribe's constitution and bylaws as amended June 18, 1996. Pet. App. I. The relevant parts of the constitution and bylaws (Cont'd)

The language of the Tribe's 1972 constitution plainly authorizes the Tribal Council's enforcement of the Dance trail buffer zone. Article III of the 1972 constitution extends the "jurisdiction of the Hoopa Valley Tribe" to "all lands within the confines of the Hoopa Valley Reservation boundaries as established by Executive Order. . . ." HL 91.

Article IX § 1(*l*) of the Tribe's 1972 constitution enumerates the powers of the Tribal Council, one of which powers expressly includes the authority to regulate "non-members of the Hoopa Valley Tribe" under specified circumstances. However, that power is further subject to prior approval by the Commissioner of Indian Affairs. HL 92-93.

Bugenig exaggerates the scope of the circuit court's decision. Few of the governmental powers addressed in the 1972 constitution directly affect nonmembers. Moreover, the governmental powers are very specific and relate to only one Indian tribe. The circuit court thus properly concluded that the congressionally approved language of articles III and IX contemplates acts affecting nonmembers and plainly authorize the Hoopa Tribal Council to regulate private property to protect cultural and historical resources:

> Like art. III, art. IX(1)(*l*) is unambiguous. It states unequivocally that the Council can pass an ordinance that affects non-members and their lands, so long as the ordinance safeguards and

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(Cont'd)
ratified by Congress are set forth in the Hoopa Lodging, HL 91-94. Thus the brief of amicus curiae States of Idaho, *et al.*, quoting article IX, § 1(k), in Pet. App I-2, which purports to refer to enforcing conduct ordinances as to "nonmembers" of the Tribe is inaccurate; the ratified document omits that authority.

> promotes the peace, safety, morals, and general welfare of the Tribe and is approved by the Commissioner of Indian Affairs. An ordinance that is designed to protect a tribe's significant archeological and cultural resources "safeguard[s] and promote[s] the peace, safety, morals and general welfare" of the tribe. It is undisputed that the ordinance was approved by the Commissioner of Indian Affairs.

Pet. App. A-23. Although Bugenig asserts that article IX, § 1(*l*), refers only to consensual commercial dealings, Pet. 17, the language of article IX does not support that contention. Similarly, Bugenig's assertion that article IX refers only to *in personam* jurisdiction over nonmembers, Pet. 18, is not supported by the language of the article and places form over substance: The trees did not cut themselves. Moreover, this Court's precedent counsels that the tribal courts' understanding of such provisions should be accorded deference. *E.g.*, *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 855-56 (1985); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987).

The statutory phrase "ratified and confirmed" is the same term of art Congress historically has used to give legal recognition to Indian agreements with the United States. *E.g.*, *Antoine v. Washington*, 420 U.S. 194, 200-04 (1975); *see also* Pet. App. A-18 (citing acts ratifying and confirming agreements with tribes). In short, the plain meaning of "ratified and confirmed" is to give every clause in the document being ratified the express authorization of Congress.[5]

5. When Congress acts as it did here, it does not necessarily federalize a tribe's governing document or authority. *See* 25 U.S.C. (Cont'd)

b. The legislative history of the Settlement Act confirms Congress' intent to address an acute problem by making a statutory delegation of authority to the Hoopa tribal governmental council.[6] The explanations in both the House and Senate reports on the Settlement Act confirm that the Act was intended as a statutory delegation of authority to manage all of the territory and inhabitants of the Reservation because of the need to remove impediments to governance by the Hoopa Valley Tribe mandated by the court in *Puzz v. United States*. Pet. App. A-25; F-24.[7]

(Cont'd)
§ 1214(b) (disclaiming codification of Alaskan tribe's constitution into federal law, but recognizing tribal status). This Court, describing the concept as "express authorization by federal statute," and "a different congressional direction," *Strate v. A-1 Contractors*, 520 U.S. 438, 445-46 (1987), clarified that "delegation" is not used in a technical sense. Accordingly, Congress did not necessarily confer federal power upon the Hoopa Valley Tribe. Instead Congress intended to do precisely what it said: It ratified and confirmed the expressly stated powers delineated in the 1972 Hoopa Constitution. Congress' authorization of the exercise of the Tribe's civil authority defined in its Constitution ensures the continued survival of those powers whether or not they are also inherent powers. *See United States v. Enas*, 255 F.3d 662 (9th Cir. 2001), *cert. denied*, 534 U.S. __, 70 U.S.L.W. 3463 (2002).

6. The 1990 amendments to the Settlement Act show additional Hoopa tribal authority over matters affecting nonmember Indians, specifically preparation of the Settlement Roll and analysis of the "over 8,000 applications for the Settlement Roll." S. Rep. No. 101-226 at 15, 101st Cong., 1st Sess. (1989).

7. *See* Senate Report at HL 39 (statutory delegations to manage resources), 48 (territorial management powers), 27 (remove impediments to governance); H. Rep. 938 at 14 (management authority), 15 (statutory delegation), 18 (management of the reservation), 100th Cong. 2d Sess. (1988); witness testimony at HA 95-99.

In *Puzz v. United States*, Lillian Puzz and other individuals who did not qualify as Hoopa tribal members brought a suit to limit the governing authority of the Hoopa Valley Tribe and to compel creation of a reservation-wide tribal government representing the entire former Joint Reservation. Judge Henderson refused but ruled that the BIA had a duty to administer the Reservation and consult with all persons — tribal members or not — who could trace their ancestry to Indians connected with the Reservation at any time in the past. He did not define that group. *Puzz v. United States* (N.D. Cal. April 8, 1988), HL 1.

At the core of the *Puzz* decision is the recognition of the ongoing issue of the Hoopa Valley Tribe's governing authority over nonmembers. *Puzz v. United States* originated, Judge Henderson found, "because only one functioning tribal government was formed, on a reservation occupied by members of several distinct tribes and groups." Rejecting entitlement standards fashioned in the *Short* case,[8] the *Puzz* court mandated the BIA to reduce the Hoopa Valley Tribal Council to the role of an advisory body. The court emphasized that federal recognition of the Hoopa Valley Tribe with respect to the former Joint Reservation did not entail the power to control territory and manage resources of nonmembers, finding that "[t]ribes have these further powers

8. The multiple opinions in the *Short* litigation show that the Hoopa Valley Tribe's governmental authority over nonmembers has long been in issue. *E.g.*, 486 F.2d 561 (op. only), 202 Ct. Cl. 870 (op. and findings) (1973) (per curiam), *cert. denied*, 416 U.S. 961 (1974) ("*Short I*"); 661 F.2d 150 (Ct. Cl. 1981) (en banc), *cert. denied*, 455 U.S. 1034 (1982) ("*Short II*"); 719 F.2d 1133 (Fed. Cir. 1983), *cert. denied*, 467 U.S. 1256 (1984) ("*Short III*"); 12 Cl. Ct. 36 (1987) ("*Short IV*"); 25 Cl. Ct. 722 (1992) ("*Short V*"); 28 Fed. Cl. 590 (1993) ("*Short VI*"); 50 F.3d 994 (Fed. Cir. 1995) ("*Short VII*").

only when the government has conferred on them, by treaty or statute, a right of territorial management." HL 5.

The regulatory vacuum Judge Henderson's *Puzz* orders created was an administrative nightmare and provoked Congress into action. The Settlement Act was introduced on April 24, 1988, as H.R. 4469. Four hearings were held. House Serial Nos. 100-75, 100-77; Senate Hrg. 100-946, 100-949. *See* HL 95-99. The Senate version of the bill, substantially different from the bill introduced, became law on October 31, 1988, as Public Law 100-580, 102 Stat. 2924.

The Settlement Act divided the former Joint Reservation into two reservations, mooted the *Puzz* orders, expedited the *Short* litigation,[9] and enabled the Yurok Tribe to organize a tribal government on the Klamath River portion of the Reservation.

Sections 4 through 6 of the Settlement Act clarify the beneficiaries of the Hoopa Valley and Yurok Reservations assets. Section 4 established a Hoopa-Yurok Settlement Fund. Section 5 directed the BIA to create a Hoopa-Yurok Settlement Roll based on eligibility criteria established for Indians of the Reservation in *Short*. Section 6 established

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9. Because of BIA's disbursement of timber monies to only enrolled Hoopa tribal members in the 1950s, descendants of Indians who were not members of any tribe filed a breach of trust case in the Court of Claims in 1963. Plaintiffs in *Short v. United States* asserted they had ancestors who were allotted tracts of land on the Reservation, or, like Petitioner, that their ancestors had long lived in proximity to the Hoopa Valley Reservation. Accordingly, they claimed that they, too, should have received per capita payments although they were not Hoopa tribal members. The *Short* litigation, which spans almost forty years, includes seven major opinions; hundreds of unreported orders, and several related lawsuits. *See* note 8, *supra*.

three choices for persons qualified for the settlement roll: Hoopa tribal membership, Yurok tribal membership, or receipt of a lump sum payment. *See generally* HL 55-64.

The text of the Settlement Act demonstrates that it is a tightly integrated solution to a complex problem. *E.g.*, HA 44 ("The decisions [in *Short* and related cases] and *Puzz* . . . while perhaps correct on the peculiar facts and law, have had a very unhappy result.") Accordingly, the Act must be read as a whole, and Congress should not be held to a simplistic and rigid standard when it was trying to establish a broad and balanced settlement to a range of complicated problems. *See, e.g., Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962), *summarily aff'd*, 373 U.S. 758 (1963). For example, the ratification and confirmation of governing authority provided by section 8 became effective only if the Hoopa Valley Tribe, within 60 days after the enactment of Pub. L. 100-580, adopted and transmitted to the Secretary a resolution waiving certain claims and affirming assent, which resolution had to be determined valid and printed in the Federal Register. Pet. App. H-4. The Tribe enacted the required resolution, reciting that

> [t]he *Puzz* case has interpreted *Short* and applicable law in a manner which prohibits the Hoopa Valley Tribe from exercising territorial management powers over the Hoopa Square and has crippled the power of the Hoopa Valley Business Council to exercise the authorities granted under the Tribe's Constitution . . . to govern non-members and generally to safeguard and promote the peace, safety and general welfare of the Hoopa Valley Tribe.

53 F. Reg. 49361 (Dec. 7, 1988), HL 21-22. By complying with the resolution requirement, the Hoopa Valley Tribe assented to separation of the Square from Yurok reservation land, and the Hoopa Valley Tribe's authority to govern within the Square was affirmed. Hoopa nonmembers were not compelled to move from the Square, and many remain.

The Senate Report explains that Congress' understanding of the law governing the Square was that, absent a statutory delegation, the Hoopa tribal government could not manage the area. Pet. App. A-19 (citing S. Rep. at 9, HL 39). *See also* HL 27 ("The claims in [*Short* and collateral cases] have made it impossible for the Hoopa Valley Tribe to perform normal tribal governmental functions, including the management of a significant portion of the reservation property."); *id.* ("The authority of the Hoopa Valley Tribe to govern the Hoopa Valley Square and its interests in the assets of the Square will be confirmed."); *id.* ("This legislation will remove the legal impediments to the Hoopa Valley Indian Tribe to governance of the Hoopa Square and establish and confirm its property interest in the Square.").

Yet Bugenig basically contends that Congress, which was spurred to action by the *Puzz* and *Short* orders — that necessarily involved the Hoopa Tribe's governmental authority over nonmembers — failed to address the need for a statutory delegation. Such a result is nonsensical and unsupported by the language and legislative history of the Settlement Act. Given Congress' broad authority over Indian affairs, it could have addressed this problem in a number of different ways. It chose to do so by confirming enumerated powers listed in the 1972 Hoopa Constitution only.

The meaning of the language of section 8 and the Hoopa constitution cannot be more clear. The ordinances of the Hoopa Valley Tribe in effect when the Settlement Act was before Congress expressly affected nonmembers.[10] The testimony of the witnesses in the hearings leading up to passage of the Settlement Act referred to such regulations. HL 95-96, 99. Certiorari is not warranted here.

2. The Circuit Court's Decision Presents No Conflict with the Decisions of this Court.

a. Conflicts in the law requiring this Court's resolution "must be both direct and apparent." R. Gressman, et al., *Supreme Court Practice* 202 (6th ed. 1986). Bugenig's strained misreading of this Court's decisions falls far short of this requirement. As the discussion above shows, the circuit court's decision is the result of a straightforward exercise of applying the plain language of a federal statute and a document incorporated by that statute. The specificity of the language of both provisions limits the effect of the decision below to one tribe in Northern California.

Section 8 of the Settlement Act is mentioned in previous decisions of the courts of appeals for the Ninth Circuit, District of Columbia, and Federal Circuit. *E.g.*, *Shermoen v. United States*, 982 F.2d 1312, 1316-20 (9th Cir. 1992) (*Puzz* case challenged right of Hoopa Valley Tribe to govern; relief sought would prevent Tribe from exercising sovereignty over the reservation allotted to them by Congress); *Heller*,

10. *See, e.g.*, HL 49 ("The intent of the legislation is to resolve a long-standing controversy between the Hoopa Valley Tribe which is organized under constitutional provisions approved by the Secretary of the Interior and persons who are primarily, but not exclusively, of Yurok Indian descent."); *see also* HL 100.

Ehrman, White & MacAuliffe v. Babbitt, 992 F.2d 360, 362 (D.C. Cir. 1993) (*Puzz* held that no single tribe had exclusive authority over any part of the reservation and ordered BIA to assume management; the Settlement Act overruled and mooted *Puzz*); *Karuk Tribe of California v. Ammon*, 209 F.3d 1366 (Fed. Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001) (denying that Settlement Act was a taking). None of these opinions conflicts with the circuit court's reading of section 8. Petitioner essentially concedes as much. Pet. 10.

To invite this Court's review of this unique case, Bugenig contends that the circuit court's decision conflicts with a "standard" established in another circuit. However, the purported standard is drawn solely from a dissenting opinion in *Arizona Public Service Co. v. U.S. EPA*, 211 F.3d 1280, 1302-03 (D.C. Cir. 2000), *cert. denied*, 121 S. Ct. 1600 (2001), which provides no basis for the assertion that the circuit court's decision conflicts with decisions of this Court.

Moreover, Bugenig asserts that this unique case requires the Court to fashion a general standard for congressional delegations of authority with respect to Indian reservations. Bugenig contends that the standard should be, unless Congress expressly recites language from the Indian Country statute, 18 U.S.C. § 1151, and states precisely that the congressional authorization applies to *all* land in a reservation "notwithstanding the issuance of any patent," a presumption arises that Congress did not authorize tribal regulatory authority over non-Indians. Pet. 19-20.

As a threshold matter, Bugenig formulates the issue incorrectly. This Court's cases, such as *Duro v. Reina*, 495 U.S. 676 (1990), teach that the question is formulated as whether a tribe possesses jurisdiction over nonmembers,

not non-Indians. *See also United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

Bugenig then appears to argue that what Congress did in the Settlement Act is unusual or somehow flouts some presumption of a lack of authority over nonmembers on reservation land. *See* Pet. at 20. Yet Bugenig's own citation of numerous statutes undercuts her argument. *Id.* In fact, Bugenig's examples demonstrate that congressional authorization of tribal authority over lands within a tribe's reservation has become quite common.

Bugenig proceeds to misconstrue not only § 1151 but also this Court's cases on the subject. The language of § 1151 was not dispositive in either case Bugenig cites to support her position. *E.g.*, Pet. 20 (citing *United States v. Mazurie*, 419 U.S. 544 (1975), and *Rice v. Rehner*, 463 U.S. 713 (1983)). *Mazurie* focuses on a different statute, 18 U.S.C. § 1154, which exempts "fee-patented lands in non-Indian communities" within Indian reservations from the federal liquor laws.

The authorization of tribal authority noted in both *Mazurie* and *Rice* comes from a third statute, 18 U.S.C. § 1161, allowing tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian country so long as state law is not violated. Section 1161 exempts from federal prosecution acts "in conformity . . . with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior and published in the Federal Register."

Congress used no specific words of delegation in § 1161. In that statute, Congress did not recite "we hereby delegate" or make any reference to "fee patented lands." Nevertheless this Court concluded that tribal liquor ordinances, duly adopted, certified by the Interior Department, and published in the Federal Register will have legal effect for federal criminal law purposes:

> It is also clear that Congress contemplated that its absolute but not exclusive power to regulate Indian liquor transactions would be delegated to the tribes themselves, and to the States, which historically shared concurrent jurisdiction with the Federal Government in this area. Early administrative practice and our prior decision in *United States v. Mazurie*, 419 U.S. 544 (1975), confirm this understanding of § 1161.

Rice v. Rehner, 463 U.S. 713, 728-29 (1983).

Section 1161 is not the only congressional authorization that undercuts Bugenig's purported standard. In *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1987), this Court noted that, in a statute that makes no reference to fee patent lands, "Congress provided for tribal criminal jurisdiction over nonmember Indians." 25 U.S.C. § 1301(2). *See also United States v. Enas*, 255 F.3d 662 (9th Cir. 2001), *cert. denied*, 534 U.S. __, 70 U.S.L.W. 3463 (2002).

Bugenig's backward reasoning from § 1151 fails to show that the circuit court violated an interpretive rule or that Bugenig's purported standard has ever been adopted. The definition of Indian Country in 18 U.S.C. § 1151 embraces three areas: (a) Indian reservations; (b) dependent

Indian communities; and (c) Indian allotments.[11] The historical and revision notes on the 1948 Act, from which this section comes, notes that it consolidates numerous provisions into a concise statement of the applicable law. *Alaska v. Native Village of Venetie*, 522 U.S. 520, 528-30 (1998). Thus instead of this Court imposing an interpretive rule on Congress declaring that unless a statute recites that, within Indian reservations, it applies "notwithstanding the issuance of any fee patent, and, including rights-of-way" federal authority would not apply, in fact, the opposite is true: federal authority applies to all areas within an Indian reservation "except as otherwise provided."

b. Federal law presumptively governs all lands within an Indian reservation. *Alaska v. Native Village of Venetie*, 522 U.S. 520, 526 n.1 (1998) (primary jurisdiction over Indian country rests with federal government and tribe). This presumption is illustrated by *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998):

> We must decide whether a landfill constructed on non-Indian fee land that falls within the boundaries of the original Yankton Reservation remains subject

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11. The section states: "Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of state, and "all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151.

> to federal environmental regulations. If . . . the ceded lands no long constitute "Indian Country" as defined by 18 U.S.C. § 1151(a), [then] the State now has primary jurisdiction over them.

Id. at 333. *See also Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 478-79 (1976) (refusing to ignore reservation status of fee lands).

While Bugenig notes that Congress has often cited the Indian Country definition in the context of tribal regulatory authority, Pet. 20, there are examples of congressional authorization of tribal authority over nonmembers that do not refer to the Indian Country definition. *E.g.*, 16 U.S.C. § 470a(d) (historic preservation programs); 25 U.S.C. § 1903(4) (child welfare); 25 U.S.C. §§ 450, *et seq.* (Indian self-determination); Act of June 28, 1898, 30 Stat. 495, ch. 517 (Curtis Act).

The Court has previously stated that the correct standard for interpreting an ambiguous congressional delegation is not to require use of "magic words" from § 1151 but rather:

> When we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: "[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. at 766.

County of Yakima v. Yakima Nation, 502 U.S. 251, 269 (1992); *see also Antoine v. Washington*, 420 U.S. 194, 199-200 (1975) (construing a series of ratifying statutes); *Choate v. Trapp*, 224 U.S. 665, 675 (1912) (involving a

ratifying statute). Thus Bugenig's effort to import the standards applicable to pre-statehood conveyances of lands beneath navigable waters, Pet. 19 n.15, is entirely inapposite.

By focusing on the geographic scope of the congressional authorization, Bugenig's proposed rule of construction, ignores the most common situation, a nonmember located on tribal property. *E.g.*, *Nevada v. Hicks*, 121 S. Ct. 2304 (2001); *Duro v. Reina*, 495 U.S. 676 (1990); *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999). Bugenig essentially argues that Indian reservations are dissolved to the extent that, under an allotment act, non-Indian settlers come upon it and purchase land.

This Court has directly and repeatedly rejected that contention. Most reservation land allotments are held by Indians. *Seymour v. Superintendent*, 368 U.S. 351 (1962), points out that:

> [T]he strongest argument against the exclusion of patented lands from an Indian reservation applies with equal force to patents issued to non-Indians and Indians alike. For that argument rests upon the fact that where the existence or non-existence of an Indian reservation, and therefore the existence or non-existence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine . . . jurisdiction.

Id. at 357-58 (footnotes omitted).

This Court has explained, in a case concerning a portion of the Hoopa Valley Reservation, that Indian Country is not "confined to land formerly held by the Indians, and to which their title remains unextinguished, but includes all tracts 'lawfully set apart as an Indian reservation.'" *Donnelly v. United States*, 228 U.S. 243, 269 (1912). The strength of this principle was confirmed sixty years later, in another case concerning the Hoopa Valley Reservation, when this Court stated that "[A]ll tracts included with [a reservation] remain a part of the reservation until separated therefrom by Congress." *Mattz v. Arnett*, 412 U.S. 504, 505 (1973) (quoting *United States v. Celestine*, 215 U.S. 278, 285 (1909)).

c. Contrary to Bugenig's submission, the effect of congressional authorization of Hoopa tribal authority upon state authority is not presented here. Pet. App. A-27-28. Thus the reference to *Solid Waste Agency of Northern Cook County v. U.S. Corps of Engineers*, 531 U.S. 159 (2001), is inapposite to a factual context that does not address the possibility of state control over Bugenig's conduct. As the circuit court noted, when the facts became clear, California revoked Bugenig's exemption stating "no timber operations are allowed on significant historical or archeological sites [defined as] sites that have significant or religious importance to California Indians." Pet. App. A-11. The circuit court observed that the absence of state regulatory jurisdiction over land is not a necessary condition for federal or tribal regulatory jurisdiction over the same land and that this Court has noted that tribal and state jurisdiction are not mutually exclusive. App. A-28 (citing *Brendale v. Yakima Indian Nation*, 492 U.S. 408, 440 n.3). *See also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980) (preemption standards applicable to Indian Country).

3. There Is No Conflict Between the Circuit Court's Decision and the Precedent Affirming Congress' Authority over Fee Lands in Indian Country.

Just last term, this Court again noted Congress' plenary authority in Indian Country. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 121 S. Ct. 1825 (2001). Thus, Bugenig's contention that Congress' authorizing tribal authority over fee lands belonging to nonmembers conflicts with decisions limiting Congress's authority over such lands is baseless. Pet. 24-30.

In *Atkinson* the Navajo Nation sought to impose a hotel occupancy tax on a non-Indian's trading post on non-Indian land within the reservation. The Court would not have said "For powers not expressly conferred them by federal statute or treaty, Indian tribes must rely upon their retained or inherent sovereignty," *id.*, 121 S. Ct. at 1830, if Congress could not confer such powers upon a tribe by federal statute or treaty. The Court would not have reasoned that "[b]ecause Congress has not authorized the Navajo Nation's hotel occupancy tax through treaty or statute . . . the Navajo Nation [must] establish the existence of one of *Montana*'s exceptions," if in fact Congress had no such authority.

As noted above, this Court's recent cases make it very clear that Congress may authorize tribes to govern and in fact often has delegated authority to Indian tribal governments with respect to both the land and persons of nonmembers, including non-Indians. *E.g.*, Pet. 20.

The obligations of the United States to Indian tribes and the power of Congress to regulate commerce "with the Indian Tribes," U.S. Const. art. I, § 8, neither begins nor ends with the Allotment Act and the fee patent process. *See, e.g., United States v. Mitchell*, 445 U.S. 535 (1980) (trust established by

general allotment act does not furnish cause of action or damages). From several ancient cases, Bugenig derives the obvious conclusion that "once a patent is issued for an allotment the trust relationship between the federal government and the owner of the fee ends." Pet. 25-26 (citing *Levindale Lead & Zinc Mining Co. v. Coleman*, 241 U.S. 432, 438 (1916); *United States v. Waller*, 243 U.S. 452, 463 (1917); *Bailess v. Paukune*, 344 U.S. 171, 173 (1952)). But issuance of a fee patent is simply the act by which the United States ceases to hold a particular tract in trust for an individual Indian. The fee patent certainly does not end federal power to protect the surrounding tribal lands.

In a thorough discussion, the circuit court explained that Congress has plenary jurisdiction over Indian reservations, which it retains after allotment and may exercise so long as Congress's act is rationally related to the protection of Indians. Pet. App. A-29 (citing *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 86 (1977)).

Authorization to exercise tribal authority over nonmembers has become common. Petitioner herself cites a series of statutes by which Congress exercises authority over fee patented lands of Indian reservations with respect to criminal matters, highway safety, open dumps, surface mining, water and air. Pet. at 20. The National Historic Preservation Act, indicates that tribes may assume functions for preserving and protecting historic properties in a manner that conforms to the cultural setting of the tribal heritage preservation goals and objectives.[12] Nothing could be clearer

12. 16 U.S.C. § 470a(d)(2)(D)(iii) provides that tribes may assume functions of state historic preservation officers pursuant to plans approved by the Secretary of the Interior except that "with respect to properties neither owned by a member of the tribe nor (Cont'd)

than that Congress's authorization here of a tribal ordinance protecting tribal lands of cultural and historic significance is tied rationally to Congress's fulfillment of its unique obligation to Indians.

CONCLUSION

For the reasons stated above, respondents request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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(Cont'd)
held in trust by the Secretary for the benefit of the tribe, at the request of the owner thereof, the State Historic Preservation Officer in addition to the tribal preservation officer, may exercise the historic preservation responsibilities."

(5)

Supreme Court, U.S.
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No. 01-900

In the

Supreme Court of the United States

ROBERTA BUGENIG,

Petitioner,

v.

HOOPA VALLEY TRIBE; THE HOOPA VALLEY TRIBAL COUNCIL; THE TRIBAL COURT OF THE HOOPA VALLEY TRIBAL RESERVATION; BYRON NELSON, JR., Honorable Judge of the Hoopa Valley Tribal Court; MERV GEORGE, Chairman of the Hoopa Valley Tribal Council,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO THE OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The danger inherent in the Ninth Circuit's decision extends far beyond the boundaries of Mrs. Bugenig's property and the Hoopa Valley Indian Reservation. As a dozen states and citizens from an equal number of states (and reservations) plainly recognize, the Ninth Circuit's divination of a delegation of plenary tribal authority over nonmember fee property is troubling. It is troubling because there is not a word in the plain language of the Hoopa-Yurok Settlement Act that hints at such a delegation. It is troubling because Congress' "ratification and confirmation" of a tribal constitution that is itself ambiguous when it comes to the question of delegation, falls far short of the requirement for an "express congressional delegation." And, as Mrs. Bugenig explained in her petition, it is troubling because it is unclear that Congress even had the power to delegate to the Tribe the authority to engage in local land use regulation, religiously motivated or otherwise. Respondents' attempt to belittle Mrs. Bugenig and the constitutional infirmities represented by the decision does nothing to diminish the need for this Court to grant the petition in order to explain the manner of and extent to which Congress can delegate regulatory authority to a tribal entity over nonmember fee land.[1]

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[1] While Respondents state that Mrs. Bugenig "exaggerates" the scope of the decision below, Respondents' Brief in Opposition (Opp.) at 5, it should be noted that there are many individuals in a similar predicament who could be affected by assertions of tribal authority over nonmember fee land. Significantly, of the 808,070 people living within the boundaries of Indian reservations, 370,543, or 45.8%, are non-Indians. Bureau of the Census, U.S. Dep't of Commerce, *1990 Census of Population, Social and Economic Characteristics, American Indian and Alaska Native Areas* 3 (1990).

I

NEITHER THE LANGUAGE OF THE SETTLEMENT ACT, THE TRIBAL CONSTITUTION, NOR THE LEGISLATIVE HISTORY CONTAIN AN EXPRESS AND UNAMBIGUOUS DELEGATION

Respondents would like to forget the strong presumption against the existence of tribal jurisdiction over nonmember fee property. In suggesting that the finding of a congressional delegation here would not "flout[] some presumption of a lack of authority over nonmembers on reservation land," Opp. at 14, Respondents belie their unwillingness to accept this Court's repeated exhortations that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations . . . cannot survive without ***express*** congressional delegation." *Montana v. United States*, 450 U.S. 544, 564 (1981) (emphasis added). With respect to there being "some presumption," this Court said just last year that "the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction." *Nevada v. Hicks*, 121 S. Ct. 2304, 2310 (2001).

While both the Ninth Circuit and the Tribe suggest that Congress expressly granted regulatory authority over nonmember fee land to Respondent Tribe with the Settlement Act, neither contend that anything on the ***face*** of the Act expressly grants such authority. The court below averred that the Act must be "[r]ead [t]ogether with the Tribal Constitution." Appendix in Petition for Writ of Certiorari (Pet. App.) at A-24. Alternatively, the court suggests that "the events surrounding the enactment of the Settlement Act show that Congress understood the scope of its delegation." Pet. App. at A-25. Respondent Tribe takes a similar tack. While not arguing that the Settlement Act by itself delegates federal authority, Respondent suggests that the "ratify and confirm language" of

the Act "is to give every clause in the document being ratified the express authorization of Congress." Opp. at 6. Likewise, it says that the "Act must be read as a whole, and Congress should not be held to a simplistic and rigid standard." *Id.* at 10. In other words, the Tribe admits that nothing in the Act is a plain and express delegation, but claims that a plain English standard would be too "rigid and simplistic."

A. No Other Court Has Upheld a Delegation of Tribal Authority Unless the Language of a Congressional Act Is Plain

In every instance where a court has upheld a delegation of regulatory authority, it has been based on statutory language that, ***on its face***, makes Congress' intent to delegate plain. With one exception, this has been accomplished by language that specifically refers to patented fee land, specifically the term "notwithstanding the issuance of any patent." *See* Petition for Writ of Certiorari (Pet.) at 19-22. As noted, the one exception contained enough plain language to inform the public that such a delegation was present. *See* Pet. at 21 and discussion therein of *Arizona Public Service Company v. Environmental Protection Agency*, 211 F.3d 1280 (D.C. Cir. 2000), *cert. denied, sub nom. Michigan v. Environmental Protection Agency*, 532 U.S. 970 (2001). Yet Respondent argues that these examples provide no conflict, and in confusing the question of whether a delegation has occurred here with the question of whether such a delegation would be proper, suggests that other congressional delegations support the existence and propriety of this one. Opp. at 13-14.[2] Yet the fact remains that in every other effective delegation upheld by the lower federal courts, Congress made its intent plain, either by employing the "notwithstanding the issuance of any patent language" or the manner of *Arizona Public Service*.

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[2] The question of the propriety of any such delegation will be addressed last in this reply.

Respondents suggest that 18 U.S.C. § 1161, which forms the basis of the delegation in *United States v. Mazurie*, 419 U.S. 544 (1975), and *Rice v. Rehner*, 463 U.S. 713 (1983), proves its case because § 1161 contains "no specific words of delegation." Opp. at 14-16. Respondents are wrong. First of all, this "delegation" is in fact an exception to federal prosecution under 18 U.S.C. § 1154 for liquor sales in Indian country if state and tribal laws allow such sales. Second, there is no ambiguity with respect to § 1161's applicability on nonmember fee lands. Looking first to 18 U.S.C. § 1151, one sees "Indian country" defined to include nonmember fee lands (using the "notwithstanding the issuance of any patent" language). Next, § 1154 excludes "fee-patented lands in ***non-Indian*** communities." (Emphasis added.) Indian country, for the purposes of §§ 1154 and 1161, therefore, includes the fee patented land within ***Indian*** communities–in other words the broader definition consistent with § 1151. In other words, it is plain that § 1161 applies to nonmember fee property within Indian communities. In short, neither *Mazurie*, *Rice*, nor 18 U.S.C. § 1161 provides any basis for asserting that any court has upheld any delegation without that delegation being express in the plain language of the statute itself.[3]

The court of appeals' finding that the "ratification and confirmation" of the Tribal Constitution incorporated that document into the Settlement Act leads to the unavoidable conclusion that the constitution has been federalized. Respondents' claim to the contrary, Opp. at 7 n.5, cannot be squared with the Ninth Circuit's opinion which explicitly held that the Settlement Act's conferred federal authority on the Tribe by giving its constitution "the force of law," Pet. App. at

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[3] Respondents suggest that there is no conflict with prior judicial understandings of delegation because several prior federal appellate cases dealing with the Settlement Act are not in conflict with the decision below. Opp. at 13. Of course not, they had nothing to do with the question of delegation.

A-19, and that, in adopting the buffer-zone regulation, the Tribe "was acting pursuant to authority expressly granted by Congress." Pet. App. at A-27. The Tribe's action, in other words, constituted a manifestation of federal, not retained inherent tribal, power–thus allowing the court of appeals to avoid addressing applicability of inherent authority principles. *See* Pet. App. at A-36 n.12. Second, if the court had intended to conclude that the source of the regulation lay in inherent tribal authority and not in "express" authorization by Congress, it could have simply relied upon another en banc opinion handed down only months before–*United States v. Enas*, 255 F.3d 662 (9th Cir. 2001) (en banc), *cert. denied*, 122 S. Ct. 925 (2002)–where the Ninth Circuit effectively concluded that Congress possesses the power to overrule this Court's conclusion that such inherent authority has been lost. In sum, any suggestion that the decision below did not "federalize" the tribal council's action runs cannot be squared with what the court of appeals held or respondents themselves argued.[4]

Respondent argues that four statutes authorize "tribal authority over nonmembers that do not refer to the Indian Country definition." Opp. at 17. These statutes are completely inapposite. The Historic Preservation Act, 16 U.S.C. § 470a(d), is only an informational and planning statute; it provides for absolutely no delegation of regulatory jurisdiction over nonmember fee property. Furthermore, § 470a(d)(2)(D)(iii) refers specifically to property "neither owned by a member of the tribe nor held in trust." Thus, if this were a delegation, it would be an express one using plain language. The Indian Child Welfare Act, 25 U.S.C. § 1903, does not purport to delegate regulatory authority over nonmember fee land. In any event, 25 U.S.C. § 1903(10) does in fact define a reservation to be "Indian country" per 18 U.S.C. § 1151. The Indian Self-

[4] In fact, the Ninth Circuit declined to follow the suggestion by the United States that the Tribe was exercising inherent authority. Brief Amicus Curiae for the United States in Support of Appellees at 27.

Determination Act, 25 U.S.C. § 450, refers to local control over Indian education and federal services and has nothing to do with regulatory jurisdiction over nonmember fee land. Finally, the Curtis Act, ch. 517, 30 Stat. 495 (1898), deals with private land claims. It too is not a delegation to tribes of regulatory authority over nonmember fee lands. In short, the Tribe points to not a single example where there has been an express congressional delegation without the language of delegation being plain on the face of the statute.[5]

B. The Tribal Constitution Is Not an Express Delegation of Congressional Authority

After quoting the relevant constitutional provisions, Respondents recite the en banc panel's conclusory statement that the tribe can pass ordinances affecting nonmembers. Opp. at 5-6 (quoting Pet. App. at A-23). Respondents do not address the interpretation of the dissenters, the original panel, or petitioner that Article IX, Sec. 1(*l*), of the Tribal Constitution merely authorizes the tribe to regulate trade and consensual dealings. *See* Pet. at 17 (other than to say this interpretation is "not supported," Opp. at 6). With respect to Article III of the Tribal Constitution, Respondents say nothing at all other than to recite the provision. This nonresponse hardly removes the cloud of ambiguity surrounding the Tribal Constitution.

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[5] Respondents argue that Petitioner is asking for a rule that ignores the circumstance of "nonmembers located on tribal property" and a rule that "dissolves" reservations to the extent that non-Indian settlers purchase lands under the Allotment Acts. Opp. at 18. This is silly. Mrs. Bugenig does not address nonmembers located on tribal property because that would be another case. Nor is Mrs. Bugenig suggesting that reservations and Indian country do not include nonmember-owned fee property. She is simply pointing out that absent an express congressional delegation, or one of the two *Montana* exceptions, tribes lack jurisdiction over such lands.

C. The Legislative History Shows No Congressional Intent to Delegate

Lacking a clear statement in either the Settlement Act or the Tribal Constitution, Respondent resorts to the legislative history and lodges with this Court 74 pages of legislative history. If the Settlement Act were as unambiguous as Respondents insist, none of this would be necessary. There is not a line anywhere in the history where a single Senator, Representative, or Executive branch official says anything close to: "With the Settlement Act's ratification of the Tribal Constitution we are delegating federal authority to the tribe to regulate nonmember fee property."[6] The Settlement Act was to resolve a dispute that arose after the Hoopa Indians, who had at one time controlled all tribal timber receipts, declined to share those receipts with non-Hoopa Indians who had been lawfully settled upon the reservation. *See* Pet. at 11-14. Contrary to Respondents' suggestion, Opp. at 9 n.9, the *Short* cases had nothing to do with the regulation of allotted lands belonging to nonmembers. Respondents claim that the very idea that Congress failed to address the need for a statutory delegation is "nonsensical and unsupported." *Id.* at 11. Without any indication that Congress even thought about delegation, and

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[6] About all Respondent has to offer is the two sentences from two witnesses who were under the impression that the Settlement Act would allow the Tribe to zone and tax nonmember property. Hoopa Lodging (HL) at 95-96. Other witnesses spoke about the ability to zone and tax in general. HL at 96-99. Most likely, these statements reflect not a belief that Congress was delegating this authority, but an assumption that once the tribe got the reservation back under its exclusive control, it could do these things as a matter of course. Of course, these statements were made a year before *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), confined tribal land use regulation over nonmember property to closed areas. Finally, of course, witness statements at subcommittee hearings are not very persuasive indicators of congressional intent.

because the issue of tribal regulation of nonmember fee property was ***not*** even an issue in the *Short* cases, it is perfectly sensible to conclude that Congress did not have delegation anywhere on its radar screen.

II

CONGRESS DID NOT HAVE THE AUTHORITY TO DELEGATE LAND USE REGULATION TO THE TRIBE

The question is whether Congress has the power to regulate patented property belonging to nonmember Indians when it has been held repeatedly that the federal government has been divested of all authority over these lands. *See* Pet. at 25-26. About all that Respondents can say about the authorities cited by Petitioner is that they are "ancient," but it cites no contrary authority. Opp. at 21. Respondents next suggest that Congress has power to protect surrounding tribal lands. That may be so, but there are limitations nevertheless. Just as Congress may not impose federal land use zoning on land outside the reservation, neither can it do so (on fee land) inside the reservation.[7] Finally, the recitation of various environmental laws where Congress has delegated its regulatory authority does not help Respondent. No one disputes here that Congress may regulate certain activities involving air, land, and water that affect the environment under the Commerce Clause or perhaps the Indian Commerce Clause. Nor is Petitioner disputing that Congress may be able to delegate this authority. But without a showing of authority under the Indian Commerce Clause for Congress to establish a religiously inspired buffer

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[7] Respondents' reference to *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 86 (1977), is unhelpful as it does not address the question at hand. Furthermore, while Congress may still regulate a reservation after allotments, that is not the same as saying it may regulate nonmember fee property as if it were trust property.

zone on nonmember fee property, Congress cannot delegate this authority to the Tribe.

CONCLUSION

The petition should be granted.

DATED: February, 2002.

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